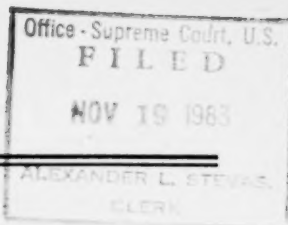


83 - 857



No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TOWN OF ORANGETOWN,

Petitioner,

v.

ANNE GORSUCH, Individually and as Administrator
of the United States Environmental Protection Agency;
RICHARD DEWLING, Individually and as Regional
Administrator of the United States Environmental
Protection Agency; ROCKLAND COUNTY SEWER
DISTRICT NO. 1; COUNTY OF ROCKLAND;
TOWN OF RAMAPO; TOWN OF CLARKSTOWN;
NEW YORK STATE DEPARTMENT OF ENVIRON-
MENTAL CONSERVATION; and ROBERT FLACKE,
as Commissioner of the New York State Department
of Environmental Conservation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November 18, 1983

QUESTIONS PRESENTED

1. Did the Administrator and Regional Administrator ("RA") of the United States Environmental Protection Agency ("EPA" or "Federal defendants") fail to make the determinations required under 33 U.S.C. §§ 1283 and 1284 of the Clean Water Act ("CWA") (33 U.S.C. §1251 et seq.), and 40 C.F.R. Part 35.925 (the "EPA Regulations"), in making the grants which are the subject of this action, and did any such failure render the grants unlawful?

2. May determinations of the nature of those required under 33 U.S.C. §§ 1283 and 1284 of the CWA, and 40 C.F.R. Part 35.925 be in some form other than in writing?

3. In weighing the controversial aspects of a major federal action to determine whether under 42 U.S.C. §4322(2)(c), Section 102(2)(c) of the National Environmental Policy Act ("NEPA") (42 U.S.C. §4321 et seq.), an Environmental Impact Statement ("EIS") should be prepared, does the significance of opposition to the action depend upon whether it is extraordinary in nature?

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
REFERENCE TO OPINIONS	2
JURISDICTION	3
STATUTES AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	4
Factual and Legal Background	4
The Proceedings Below	12
REASONS FOR GRANTING THE WRIT	24
CONCLUSION	60
APPENDIX	
Court of Appeals Opinion	A-1
District Court Findings of Fact and Conclusions of Law dated January 24, 1983	A-29
District Court Findings of Fact and Conclusions of Law dated January 25, 1983	A-48

TABLE OF CONTENTS

	<u>Page</u>
District Court Opinion and Order dated July 26, 1982	A-57
District Court Order dated September 7, 1983	A-72
District Court Order dated January 24, 1983	A-77
District Court Judgment	A-78
Finding of No Significant Impact dated August 29, 1980	A-86
Clean Water Act §§ 1283 and 1284	A-90
Environmental Protection Agency regulations 40 C.F.R. §35.925	A-100
National Environmental Policy Act 42 U.S.C. §4332(c)	A-120

TABLE OF AUTHORITIES

Cases:	<u>Page</u>
<u>Asarco, Inc. v. U.S.E.P.A.,</u> <u>616 F.2d 1153 (9th Cir. 1980)</u>	39, 40
<u>Anglo-Canadian Shipping Co.</u> <u>Ltd. v. Federal Maritime Com'n,</u> <u>310 F.2d 606 (9th Cir. 1962)</u>	33
<u>Atchison, T. & S.F.Ry. Co. v.</u> <u>United States, 295 U.S. 193</u> <u>(1935)</u>	32
<u>Bell Lines, Inc. v. United</u> <u>States, 263 F. Supp. 40</u> <u>(S.D.W.Va. 1967)</u>	33
<u>Bowman Transportation, Inc. v.</u> <u>Arkansas-Best Freight System,</u> <u>Inc., 419 U.S. 281 (1974)</u>	22, 28, 29-30, 31
<u>California v. Federal Power</u> <u>Commission, 345 F.2d 917</u> <u>(9th Cir.), cert. denied,</u> <u>382 U.S. 941 (1965)</u>	33
<u>Camp v. Pitts, 411 U.S.</u> <u>138 (1973)</u>	38-39
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Page

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<u>Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581 (1945)</u>	30
<u>County of Suffolk v. Secretary of Interior, 562 F.2d 1368 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978)</u>	39,40
<u>Dunlop v. Bachowski, 421 U.S. 560 (1975)</u>	43-44
<u>Florida v. United States, 282 U.S. 194 (1930)</u>	32
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<u>Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359, 334 N.Y.S.2d 138 (1972)</u>	4
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<u>Joseph v. F.C.C., 404 F.2d 207 (D.C. Cir. 1968)</u>	54

	<u>Page</u>
<u>Joseph v. F.C.C.</u> , 404 F.2d 207 (D.C. Cir. 1968)	54
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<u>Missouri Pacific Railroad Co. v. United States</u> , 203 F. Supp. 629 (E.D. Mo. 1962)	33
<u>Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.</u> , U.S. , 103 S.Ct. 2856 (1983)	41-42, 54
<u>Nader v. NRC</u> , 513 F.2d 1045 (D.C. Cir. 1975)	54
<u>Rucker v. Willis</u> 484 F.2d 158 (4th Cir. 1973)	56
<u>Sterling National Bank of Davie v. Camp</u> , 431 F.2d 514 (5th Cir. 1970), cert. denied, 401 U.S. 975 (1971)	54
<u>United States v. Baltimore & O.R. Co.</u> , 293 U.S. 454 (1935)	32
<u>United States v. Chicago, M. St. P. & P.R. Co.</u> , 294 U.S. 499 (1935)	32

	<u>Page</u>
<u>United States v. Fish,</u> <u>268 U.S. 607 (1925)</u>	31
<u>United States v. Nixon,</u> <u>418 U.S. 683 (1974)</u>	34
<u>USU Pharmaceutical Corp. v.</u> <u>Secretary of HEW, 466 F.2d</u> <u>455 (D.C. Cir. 1972)</u>	54
<u>Wasson v. Securities Exchange</u> <u>Commission, 558 F.2d 879 (8th</u> <u>Cir. 1977)</u>	30
<u>Webb v. Gorsuch, 699 F.2d</u> <u>157 (4th Cir. 1983)</u>	39, 40
<u>Wichita R. & Light Co. v.</u> <u>Public Utilities Commission,</u> <u>260 U.S. 48 (1922)</u>	31
 Federal Statutes:	
Administrative Procedure Act	
5 U.S.C. §555(e)	53
5 U.S.C. §557(c)	53
5 U.S.C. §557(c) (3) (A)	32
5 U.S.C. §555(e)	53
28 U.S.C §1254(1)	3
28 U.S.C. §1331	12

	<u>Page</u>
28 U.S.C. §1361	12
28 U.S.C. §2201	12
28 U.S.C. §2202	12
29 U.S.C. §482(a)	43
Clean Water Act	
33 U.S.C. §1251 <u>et seq.</u>	12
33 U.S.C. §1283	3, 9, 25
33 U.S.C. §1283(a)	8
33 U.S.C. §1284	3, 9, 25
33 U.S.C. §1284(a)	8
33 U.S.C. §1284(b) (1)	8
National Environmental Policy Act	
42 U.S.C. §4321 <u>et seq.</u>	12
42 U.S.C. §4322(2) (c)	3
49 U.S.C. §1653(f)	35
40 C.F.R. Part 6	12
40 C.F.R. Part 35 Chapter C	7

	<u>Page</u>
40 C.F.R. §35.917-5(b) (5)	11
40 C.F.R. §35.917-5(b) (6)	11
40 C.F.R. §35.917-5(b) (7)	11
40 C.F.R. §35.917-8	9
40 C.F.R. §35.920-3	9
40 C.F.R. Part 35.925	3, 9, 18 23, 26
40 C.F.R. §§ 35.925-1	8, 10
40 C.F.R. §§ 35.925-1 through 35.925-21	9, 19 21, 48, 49
40 C.F.R. §35.925-5(b)	10
40 C.F.R. §35.925-7	10
40 C.F.R. §35.925-8	10
40 C.F.R. §35.925-10	11
40 C.F.R. Part 1500	11-12

Page

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	<u>Page</u>
<u>Necessity, Form and Contents of Express Findings of Fact to Support Administrative Determination, Annot., 146 A.L.R. 209 (1943)</u>	32
<u>Note, Violation by Agencies of Their Own Regulations, 87 Harv. L. Rev. 629 (1974)</u>	34
<u>3 N. Williams, American Land Planning Law, §73.10 (1975)</u>	4
<u>A. Rathkopf, Law of Zoning and Planning, §11.03 (4th Ed. 1982)</u>	4
<u>Sofaer, Judicial Control of Informal Discretionary Adjudication And Enforcement, 72 Colum. L. Rev. 1293 (1972)</u>	46
<u>Some Kind of Hearing, 123 U.Pa. L. Rev. 1267 (1975)</u>	44-45
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NO. 83-

TOWN OF ORANGETOWN,

Petitioner,

-against-

ANNE GORSUCH, Individually
and as Administrator of
the United States Environ-
mental Protection Agency;
RICHARD DEWLING, Individual-
ly and as Regional Admini-
strator of the United States
Environmental Protection
Agency; ROCKLAND COUNTY SEWER
DISTRICT NO. 1; COUNTY OF
ROCKLAND; TOWN OF RAMAPO;
TOWN OF CLARKSTOWN; NEW YORK
STATE DEPARTMENT OF ENVIRON-
MENTAL CONSERVATION; and
ROBERT FLACKE, as Commission-
er of the New York State De-
partment of Environmental
Conservation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REFERENCE TO OPINIONS

The opinion of the United States Court of Appeals for the Second Circuit, dated September 21, 1983, is reproduced in the Appendix ("A-") at pages A-1 - A-28. The opinion is not yet reported. The findings of fact and conclusions of law of the United States District Court for the Southern District of New York, rendered in two parts, are reproduced in the Appendix* at pages A-29 - A-56.

* The reproduction in the Appendix is a retyping. The findings of fact and conclusions of law, as rendered by the District Court, were essentially those submitted by defendants, with certain

(footnote continued on next page)

The District Court also rendered an opinion on July 26, 1982, which is not reported and which is reproduced in the Appendix at pages A-57 - A-71.

JURISDICTION

The judgment of the Court of Appeals was entered on September 21, 1983. This Court has jurisdiction to review the Court of Appeals decision pursuant to 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are 33 U.S.C. §§ 1283 and 1284 and 40 C.F.R. Part 35.925 and 42 U.S.C. 4332(2)(c), Section 102(2)(c) of

(footnote continued from previous page)

portions crossed out and certain changes and additions written in by the District Court. Copies of the findings and conclusions as originally rendered are transmitted separately to this Court.

NEPA. They are reproduced at pages A-100 - A-120.

STATEMENT OF THE CASE

Factual and Legal Background

Rockland County is part of the metropolitan New York area, in which sewage treatment facilities and related collector systems are indispensable to suburban growth.* In the course of such growth, communities often seek clean

* Rockland County's suburban growth was one of the most rapid of all suburban areas in the country. It was particularly explosive in Ramapo. Its growth, and efforts to moderate and contain it, led to the enactment of the historic Ramapo Zoning Ordinance, under which the availability of sewage collection and treatment facilities was given critical importance. See Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359, 334 N.Y.S.2d 138 (1972); A. Rathkopf, Law of Zoning and Planning, §11.03 (4th Ed. 1982); 3 N. Williams, American Land Planning Law, §73.10 (1975); R.M. Anderson, New York Zoning Law and Practice §7.20 (2d Ed. 1973).

residential and commercial development and to be able to send to other communities that growth's less desirable aspects, such as their sewage.

Orangetown, one of the three mostly suburban towns of the County, has always collected its own domestic and industrial sewage, and treated it at its own plant in Orangetown, at Orangeburg. In the early 1960's, over the vigorous opposition of Orangetown, the Rockland County Sewer District No. 1 (the "District"), consisting of the other two mostly suburban towns of the County, Clarkstown and Ramapo, and Orangetown, was created. The District is governed by a board of seven Commissioners, only one of whom is selected by Orangetown.

The District thereafter built its own treatment plant (the "County plant") in

Orangetown, close to Orangetown's own plant. At all times since, Clarkstown and Ramapo have sent the bulk of their sewage to the County plant. This has helped them to retain their character as "bedroom" communities. The County plant has for many years suffered numerous breakdowns and failures, causing massive odor problems, which seriously and adversely affected the lives of the people residing and working in the nearby areas of Orangetown.

In the early 1970's, Ramapo and Clarkstown determined that, in order to grow as they desired, they needed additional interceptors and a doubling of their capacity to treat their sewage. Never seriously considering alternatives, and over Orangetown's objections, they decided to double the capacity of the County plant in Orangetown. That

decision, if implemented by the necessary financing, would mean that for at least another generation Clarkstown and Ramapo would be able to grow by sending their sewage to Orangetown.

The expanded facilities were to cost more than \$100,000,000. Grants under Subchapter II of the CWA and its implementing regulations were to provide the great bulk of the funding.

The grant process, under that Subchapter and the EPA Regulations, 40 C.F.R. Part 35 Subchapter C., consists of three steps -- planning (Step 1), design (Step 2) and construction (Step 3). The process focuses in large part upon development and approval of a "facilities plan".*

* The term "facilities planning" is
(footnote note continued on next page)

The CWA itself outlines some aspects of the grant process. 33 U.S.C. §1283 (a) requires submission of a facilities plan to the Administrator of EPA who "shall act upon [it]", whose "approval [thereof] shall be deemed a contractual obligation of the United States for the payment of its proportional contribution to such project." 33 U.S.C. §1284(a) requires further that the Administrator make a number of specific determinations, "[b]efore approving grants for any project for any treatment works" §1284(b)(1) directs that, "the

(footnote from previous page)

used in the EPA Regulations. It is defined in 40 C.F.R. §35.925-1. The CWA speaks of "plans, specifications, and estimates" 33 U.S.C. §1283(a). The term "facilities plan" or "planning" is used hereinafter in reference to both the CWA and the EPA Regulations.

Administrator shall not approve any grant for any treatment works ... unless he shall first have [made a number of other determinations]."

Much of the grant process consists of facilities planning. Implementing 33 U.S.C. §1283, approval of the facilities plan by both the State and the EPA Administrator, acting by the RA, is required, (40 C.F.R. §§ 35.920-3, and 35.917-8). Implementing 33 U.S.C. §1284, 40 C.F.R. §35.925 mandates that:

Before awarding initial grant assistance for any project for a treatment works through a grant or grant amendment, the Regional Administrator shall determine that all of the applicable requirements of §35.920-3 have been met. He shall also determine the following." 40 C.F.R. §35.925 (emphasis supplied).

There follow twenty-one paragraphs of separate determinations which must be

made by the RA. 40 C.F.R. §§ 35.925-1 through 35.925-21.

Many of the determinations required by both the CWA and the EPA Regulations concern critical aspects of the project's funding. The RA must determine, among other things, that the applicant has "[t]he legal, institutional, managerial, and financial capability to insure adequate construction, operation and maintenance of the treatment works..." (40 C.F.R. §35.925-5(b)); that the design of the works complies with certain requirements (40 C.F.R. §35.925-7); that the environmental review requirements for the project have been met (40 C.F.R. §35.925-8); and that the applicant "has made satisfactory provision to assure proper and efficient

operation and maintenance of the treatment works...." (40 C.F.R. §35-925-10).

Essential to the grant process is "public participation" at all principal stages of the facilities planning and environmental processing. There must be: consultation with the public "before selecting alternatives" (40 C.F.R. §35.917-5(b) (5)); a public meeting "when alternatives are largely developed but before an alternative or plan has been selected" (40 C.F.R. §35.917-5(b) (6)); and a public hearing "before final adoption of the facilities plan." (40 C.F.R. §35.917-5(b) (7)).

The public participation requirements concerning the alternatives to the project stem from the environmental processing requirements under NEPA and the regulations of the Council on Environmental Quality ("CEQ"), 40 C.F.R.

Part 1500, together with EPA's regulations implementing NEPA, 40 C.F.R. Part 6. The NEPA processing is integrated with the CWA processing.

The Proceedings Below

This action was commenced on February 21, 1981. Jurisdiction is based upon 28 U.S.C. §§ 1331, 1361, 2201 and 2202; 42 U.S.C. §4321 et seq. (and its implementing regulations), 33 U.S.C. §1251 et seq. (and regulations promulgated thereunder) and the principles of pendent jurisdiction.

Orangetown has sought judgment declaring unlawful Step 2 and Step 3 grants of approximately \$10,000.000* by

* Step 3 grants for \$30,000,000 for major construction costs have been awarded since the District Court judgment in this action and are the subject of a subsequent federal court action and state court proceeding.

EPA and the New York State Department of Environmental Conservation (the "DEC" or the "State defendants") to the District, for the design and for a small portion of the construction costs of the project. Orangetown claims that EPA, in making the grants, acted arbitrarily, capriciously and otherwise contrary to law, by failing to make most of the determinations required before the grants might lawfully be made, and otherwise.

The action also challenges EPA's environmental processing of the project, charging that an EIS was required to be prepared, and that a short and shallow Environmental Assessment ("EA"), upon which a preliminary finding of no significant impact ("FNSI") was based, was inadequate.

Claims are also made under the New York State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law ("ECL"), §8-0101 et seq. Orangetown also alleges that the operation of the County plant and its emission of foul and noxious odors constitutes a nuisance which will be continued and aggravated if the project proceeds.

Each defendant has denied the material allegations of the complaint as to the illegality of the grants and as to the operation of the County plant constituting a nuisance.

In April, 1981, the State defendants moved, upon sovereign immunity and Statute of Limitations grounds, to dismiss the complaint as against them. The motion was heard on July 17, 1981. Decision was reserved.

The State defendants' motion was still sub judice in July 1982, when the District, County of Rockland and Ramapo (collectively the "County defendants") moved to dismiss for plaintiff's alleged failure to prosecute, or in the alternative, for an immediate trial. The District Court thereupon scheduled the trial for October 12, 1982. Shortly thereafter, the Court granted, in part, the State defendants' motion of April 1981, by dismissing, on Statute of Limitations grounds, plaintiff's claim under SEQRA.

Plaintiff sought discovery beginning in May 1981. It attempted to depose EPA by Delmar Karlen, Jr., Esq., the officer furnished by EPA. The deposition was not permitted by the Court except as to some aspects of the determination of

what was in the administrative record. The administrative record, of approximately 45 files, was first produced and certified by EPA in the fall of 1981. On September 9 and 22, 1982, with trial imminent, they found and produced some 20 additional files. On October 7, 1982, EPA found and produced an additional 20 files. Trial began on October 12, as scheduled, and continued until October 27. At its conclusion, the District Court dismissed plaintiff's nuisance claims and reserved judgment on its other claims. It directed the parties to prepare findings of fact and conclusions of law.

On January 24 and 25, 1983, the Court essentially adopted the defendants' findings and conclusions. It dismissed

the complaint. Judgment was entered on February 4, 1983.

Plaintiff appealed on February 10, 1983. On motion by the County defendants, the Court of Appeals expedited the briefing and argument of the appeal. Argument was set down for, and held on, April 22, 1983.*

Approximately four months after the oral argument, a highly unusual and unorthodox sequence of events took place, relating to the first question presented by this petition. On or about August 8, 1983, the Clerk of the Court of Appeals, without informing petitioner's counsel, requested of EPA

* Seventeen days after argument EPA counsel, without any request therefore by the Court of Appeals, supplemented its brief and oral argument, regarding aspects of the impact of the project upon wetlands, in and by a three page letter to the panel of judges.

counsel that it forward to the Court of Appeals for its review so much of the administrative record as related to EPA's administrative actions pursuant to 40 C.F.R. §35.925. On August 9, 1983 EPA's counsel responded, forwarding portions of the record, and stating, by letter dated August 9, 1983, the following:

We are herewith transmitting the portions of the record cited in pages 36-41 of our brief, together with a copy of the index to the administrative record. The administrative record was introduced at trial as EPA Exhibit D, and each sequentially numbered folder in the administrative record ("A.R.") was given a corresponding number in EPA Exhibit D (i.e., Folder "A.R. 2" was introduced as EPA Exhibit D 2, Folder "A.R. 3" was introduced as EPA Exhibit D 3, etc.).

Plaintiff's counsel learned of the request and response upon receipt of a copy of the letter of August 9, 1983.

On or about August 15, 1983, the Court of Appeals was evidently still unable to locate the determinations in the amorphous 86 volume record. The Deputy Clerk of the Court of Appeals called EPA counsel a second time and requested that EPA identify those portions of the administrative record constituting its determinations pursuant to 40 C.F.R. §§ 35.925-1 through 35.925-21. Plaintiff's counsel were not informed of this second request.

EPA counsel responded approximately one week later. The response was a 27 page letter-brief to the Court of Appeals, in which it presented arguments, supplementing, and in some respects differing from, the arguments in its brief and oral argument, as to what the administrative record set forth

in lieu of most of the findings required. It also argued that it "never expressly or implicitly consented to trial of such claims and could have offered other evidence if there had been adequate notice that all 21 subdivisions [of 40 C.F.R. §35.925] were in issue." (August 23, 1983 letter at page 3).

Plaintiff's counsel learned of the Court of Appeals' second request and the 27 page response thereto upon receipt of a copy of it. Plaintiff thereupon moved the Court of Appeals for an order striking the response, as an authorized post-argument brief, or, in the alternative, for five (5) working days to respond thereto if the motion to strike were not granted. Plaintiff's motion was denied by the Court of Appeals, without any reason given or any state-

ment as to time for response. Plaintiff's counsel thereupon interposed a letter answering some of the points made by EPA counsel in their post-argument letter-brief.

On September 21, 1983, the Court of Appeals affirmed the District Court's judgment in all respects, with each party to bear its own costs. It upheld the District Court with respect to EPA's "Finding of No Significant Impact" and its "Procedural Compliance with Construction Grants Program". With respect to Orangetown's contention that EPA failed to assess and make the specific findings required by 40 C.F.R. §§ 35.925-1 through 35.925-21, the Court of Appeals stated:

We note, however, that while a clear and concise document outlining seriatim the agency's response to the demands

of Section 35.925 would be of considerable assistance to a court's review of EPA's actions, the regulations do not require that the agency's actions be set down in any particular order or form, or even that its determinations be made in writing. All that is necessary is that a reviewing court be able to trace from the written record the path followed by the agency in deciding to take a particular action. See generally Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc. ["Bowman"], 419 U.S. 281, 285-86 (1974). (A-25 - A-26).

Annotating (A-24 n. 10) its ruling concerning the determinations question, the Court of Appeals stated that "only three of the 21 determinations were contested in the district court." This statement was based upon its implied affirmance of the District Court's denial of plaintiff's motion under "Fed. R. Civ. P. 15(b) to conform its

pleadings to the proof adduced at trial...." Id.

Petitioner submits that the issue of the "17 remaining determinations" was, however, before the District Court. Id. Whether or not all or any of the required determinations were made is determined by the administrative record. EPA put the entire administrative record in evidence and submitted no other evidence. EPA was not denied any opportunity to "offer any additional evidence", because no other evidence could have been adduced to prove what was in the record. EPA fought throughout the trial and pretrial proceedings to bar any evidence outside of the administrative record. (A-24 n.10). The unusual sequence of events dealing with the 40 C.F.R. §35.925 determina-

tions that took place four months after argument of the appeal also enabled EPA counsel to do more than would a party litigating, in the ordinary fashion in the District Court, the issue of the requirements of the said determinations. The District Court's denial of Orange-town's motion to conform the pleadings to the proof is plainly erroneous.

REASONS FOR GRANTING THE WRIT

1. This case involves important issues, going to the heart of the administrative process, concerning the enforceability of statutory and regulatory requirements that an agency make specific determinations and findings* as the basis of non-adjudicative agency action.

* The terms "determinations" and "determine" are used in this petition, as did all parties in the proceedings below, interchangeably or together with the terms "findings" and "find".

Both 33 U.S.C. §§ 1283 and 1284 of the CWA, and EPA's own regulations direct that before the making of the grants a number of important explicit factual and legal determinations be made. Many of the determinations were directly related to important* statutory conditions precedent for the grants. Only two of the determinations can even arguably be said to appear in the administrative record, placed in evidence, in its entirety, by the Federal defendants. (EPA Ex. D1-86).**

Positions taken by the Federal defendants to explain the absence of the

* See generally a Legislative History of the Federal Water Pollution Control Act Amendments of 1972, Environmental Policy Division of the Library of Congress (January 1973).

** This reference is to the exhibits entered at the trial in the District Court.

findings took an erratic course before the District Court and Court of Appeals.

At the deposition of EPA, by Delmar Karlen, Jr.,* plaintiff's counsel asked him what documents constituted the determinations required by 40 C.F.R. §35.925. Counsel for EPA agreed to deem that question an interrogatory and to respond thereto. EPA's answer, by letter dated October 14, 1982, stated:

You have asked for a statement of the documents in the record that relate to 40 C.F.R. § 925. As the federal defendants explained previously (Karlen Affidavit, para. 11), award of the Rockland County Sewer District No. 1 ("R.C. S.D. No. 1") and Town of Ramapo grants by EPA, after review of the facilities plan, constituted EPA's determinations regarding the require-

* The District Court limited questions asked at that deposition to the steps taken by EPA to assemble its administrative record.

ments of 40 C.F.R. §35.925. As the federal defendants also noted, the administrative record may contain additional evidence of these determinations. . . .

Additionally, the administrative record contains numerous letters approving various sets of plans and specifications and subagreements. (emphasis supplied).

The interrogatory and answer were read into the record of the trial without objection. At trial, EPA's counsel placed the entire administrative record in evidence but did not identify where in that record any of the determinations appeared.

In their post-trial brief, defendants argued that the subject matter of the items was analyzed thoroughly by DEC and EPA and that the EA, not the "award of the ... grants", constituted most of EPA's determinations. The District

Court's finding with respect to the subject matter was:

The Administrative record reflects that the EPA considered those elements of the project required to be analyzed by 40 C.F.R. §35.925. Although there is no separate document listing specific determinations with respect to every element specified in 40 C.F.R. §35.925, taken as a totality the administrative record reflects that the objectives of 40 C.F.R. §35.925 were accomplished and therefore EPA complied with its terms. (A-44).

In the Second Circuit, defendants relied upon the EA as the place to find the determinations. They argued at page 36 of their brief, citing Bowman, that "the administrative record is more than sufficient for a reviewing court to follow the path the agency took in discharging its statutory duties."

Four months after oral argument of the appeal, EPA furnished in its post-

hearing brief the details of the evidence that allegedly would support the findings, had they been made.

The Court of Appeals adopted defendants' argument about "the path the agency took", citing Bowman. That case, plaintiff submits, does not stand for the proposition that statutory and regulatory requirements for specific findings need not be followed, and that "a decision of less than ideal clarity" may be upheld, "if the agency's path may reasonably be discerned." Bowman, 419 U.S. at 286.

The "agency path" language of the Supreme Court in Bowman appears at the conclusion of a paragraph of the opinion of this Court in Bowman, per Mr. Justice Douglas, discussing in general terms the "'arbitrary and capricious' standard" of

judicial review of agency action. Id. at 285. The paragraph immediately preceding the paragraph in which that quotation appears is the specific recital by this Court of the fact that the agency involved, the Interstate Commerce Commission, had "made both findings" required by its organic act.*

* The "path followed" phrase appears in an earlier opinion by Mr. Justice Douglas, in Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 584 (1945) in which Orders under "§5 of the Natural Gas Act of 1938, 52 Stat. 823, 15 U.S.C. §717d, 15 U.S.C.A. §717d", were reviewed and affirmed by the Tenth Circuit. In affirming the ruling of the Tenth Circuit, this Court discussed the sufficiency of detail of the Federal Power Commission's findings. The findings were said to be "quite summary" incorporating by reference Commission exhibits, but, the Court stated, "the path which it followed can be discerned." Id. at 595. Accord, Wasson v. Securities Exchange Commission, 558 F.2d 879 (8th Cir. 1977).

Bowman accordingly, cannot be deemed to be this Court's answer to the question of the effect of the failure of an agency to render findings required by statute or by its own regulation as the basis of non-adjudicative agency action.

In a number of earlier cases, concerned with more formal agency action, the Supreme Court has held that such an agency failure invalidates its determination. See Wichita R. & Light Co. v. Public Utilities Commission, 260 U.S. 48 (1922) (rate order); Mahler v. Eby, 264 U.S. 32 (1924) (deportation of an alien); United States v. Fish, 268 U.S. 607 (1925) (order of board of general appraisers). In a number of cases involving the ICC, this Court has also held that, apart from specific statutory requirements, determinations by that agency could not be sustained unless

supported by express findings of the basic or jurisdictional facts. United States v. Baltimore & O.R. Co., 293 U.S. 454 (1935); United States v. Chicago, M., St. P. & P.R. Co., 294 U.S. 499 (1935); Atchison, T. & S.F.Ry. Co. v. United States, 295 U.S. 193 (1935); Florida v. United States, 282 U.S. 194 (1931).*

Perhaps the most pervasive findings requirement is that of the Administrative Procedure Act ("APA"), 5 U.S.C. §557(c)(3)(A), which requires that in every on the record proceeding the agency rendering a decision include a statement of "findings and conclusions, and the reasons or basis therefore, on

* See Necessity, form and contents of express findings of fact to support administrative determinations, Annot., 146 A.L.R. 209 (1943).

all the material issues of fact, law, or discretion presented in the record." This requirement is rigorously enforced, although there are varying rulings, from case to case, as to the exact degree of particularity of the findings required. See, e.g., California v. Federal Power Commission, 345 F.2d 917 (9th Cir.), cert. den., 382 U.S. 941 (1965); Anglo-Canadian Shipping Co. Ltd. v. Federal Maritime Comm'n, 310 F.2d 606 (9th Cir. 1962); Bell Lines, Inc. v. United States, 263 F. Supp. 40 (S.D.W. Va. 1967); Missouri Pacific Railroad Co. v. United States, 203 F. Supp. 629 (E.D. Mo. 1962).

Should the determinations requirements, statutory and regulatory,* for

* Enforcement of an agency's regulatory
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grants under the treatment works program of the CWA be enforced at least as rigorously as those of the APA? This Court has not ruled on the question. Nor, so far as petitioner's counsel have been able to discover, does any decision of this Court answer the same question in the context of agency grant making action or other informal agency action.

The function and importance of findings requirements is a principal subject of Overton Park. This Court, after holding that action of the Secre-

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requirement of specific determinations is consistent with the more general rule that an agency must adhere to "a strict standard of compliance" with its own regulations and procedures. Citizens to Preserve Overton Park ("Overton Park"), 401 U.S. 402 (1971). See also United States v. Nixon, 418 U.S. 683, 694-96 (1974). See Note, Violation by Agencies of Their Own Regulations, 87 Harv. L. Rev. 629, 630 (1974).

tary of Transportation under Section 4(f) of the Department of Transportation Act of 1966 (49 U.S.C. §1653(f)) was reviewable, began discussion of the review process by observing that:

Undoubtedly, review of the Secretary's action is hampered by his failure to make such findings, but the absence of formal findings does not necessarily require that the case be remanded to the Secretary. Neither the Department of Transportation Act nor the Federal-Aid Highway Act require[d] such formal findings. Moreover, the Administrative Procedure Act requirements that there be formal findings in certain rulemaking and adjudicatory proceedings do not apply to the Secretary's action here. See 5 U.S.C. §§ 553(a)(2), 554(a) (1964 ed., Supp. V).* Overton Park, 401 U.S. at 417.

* The Court further noted that:

And, although formal findings may be required in some cases

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The Court went on to hold that the lower court review of the Secretary's action, "based ... on the litigation affidavits that were presented" was inadequate because "[those] affidavits were merely 'post hoc' rationalizations" Overton Park at 419. This Court remanded the action to the district court for review "based on the full administrative record".* In that review

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in the absence of statutory directives when the nature of the agency action is ambiguous, those situations are rare. See City of Yonkers v. United States, 344 U.S. 298, 320 (1953). Overton Park, 401 U.S. at 417.

* Subsequent proceedings in the district court are described in W. Gelhorn, C. Bayse and P. Strauss,

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the district court might "require the administrative officials who partici-

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Administrative Law Cases and Comments
(7th Ed. 1979):

The remand in Overton Park was indeed arduous; it produced a 25-day hearing in district court following extensive (and disruptive) pre-trial discovery, all seeking to 'prove' the Secretary's reasoning process for the purpose of permitting Section 706(2)(A) review to occur. The process threatened to bring into public view pre-decisional advice to the Secretary ordinarily regarded as privileged, as part of the 'full administrative record that was before the Secretary at the time he made his decision.' Whether or not 'formal findings' were 'required', surely there was profound impetus to making them in the Court's observation that, 'where there are administrative findings that were made at the same time as the decision, as was

pated in the decision to give testimony [by deposition or on trial] explaining their action." Overton Park, 401 U.S. at 420.

The availability of discovery to supplement the administrative record, as well as the propriety of the Court's receiving evidence -- on summary judgment motion or at trial -- beyond the administrative record, has become a problem of increasing import since Overton Park. The problem was before this Court in Camp v. Pitts, 411 U.S. 138, 142 (1973), in which it held that

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the case in [United States v. Morgan, 313 U.S. 409 (1941)], there must be a strong showing of bad faith or improper behavior before such inquiry may be made.' See also Camp v. Pitts, p. 338 above. Id. at 368-69 (footnotes omitted).

"the focal point for judicial review [of administrative action] should be the administrative record already in existence, not some new record made initially in the reviewing court."

Since Camp v. Pitts, supra, a large number of cases have dealt with the problem of whether in review of informal agency action the administrative record may be supplemented.

The problem is acute in review of environmental agency action and in a number of cases,* particularly those involving review of the sufficiency of EAs or EISs, it has been held that

* See, e.g., Webb v. Gorsuch, 699 F.2d 157 (4th Cir. 1983); Asarco, Inc. v. U.S.E.P.A. ("Asarco"), 616 F.2d 1153 (9th Cir. 1980); County of Suffolk v. Secretary of Interior ("County of Suffolk"), 562 F.2d 1368 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978).

supplementation of the administrative record should be permitted and discovery should be available.* The District Court held to the contrary herein. It forbade inquiry, on discovery and at trial, into what constituted the findings and where they were, and precluded virtually all other discovery.

The importance of findings can hardly be overstated. Findings are not some formal tidying up of administrative agency decisionmaking, on the record or informal. Whether they exist or not is the first and fundamental inquiry in the judicial review process. They are the clearest indication of the bases of the administrative action. If findings do

* See, Webb v. Gorsuch, supra; Asarco, supra, County of Suffolk, supra. K. Davis, Administrative Law Treatise at 570-74 (1982 Supplement).

not appear in the record and the bases of the decisionmaking are not otherwise clear, the court reviewing the action may require discovery.

Twenty-one years after Overton Park, in its most recent statement of general principles of the scope and manner of judicial review of the administrative action, this Court again referred to findings as an essential aspect of such review. The duty of the agency, as stated in Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co. ("Motor Vehicle"), ___ U.S. ___, 103 S.Ct. 2856, 2866-67 (1973), quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962), is to "examine the relevant data and articulate a satisfactory explanation for its action

including a 'rational connection between the facts found and the choice made.'"

In Motor Vehicle the facts to be found were not specifically mandated by statute or regulation. In this case they are. It is not the function of the reviewing court to find the facts. Nor when specific determinations are mandated by the very statute that defines the power and duty of the agency to act, and by the agency itself, should it be permitted to tell the reviewing court: "You trace our path to find the 'facts [we] found'. We assure you they are there somewhere."

Findings are closely related to a statement of reasons. Both enable a reviewing court to examine into the bases of the agency decisionmaking to determine whether it is rationally

connected to the facts. In Dunlop v. Bachowski, 421 U.S. 560 (1975), this Court construed §401 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §482(a), to require a detailed statement of reasons by the Secretary of Labor for his non-adjudicative action of denying a complaint by an unsuccessful candidate for union office. The Court stated:

[W]hen action is taken by [the Secretary] it must be such as to enable a reviewing Court to determine with some measure of confidence whether or not the discretion, which still remains in the Secretary, has been exercised in a manner that is neither arbitrary nor capricious [I]t is necessary for [him] to delineate and make explicit the basis upon which discretionary action is taken... [W]e may reasonably infer that Congress intended that the Secretary supply the member with a reasoned statement why he determined not to proceed ... Finally, a 'reasons' require-

ment promotes thought by the Secretary and compels him to cover the relevant points and eschew irrelevancies... Id. at 571-72 (citations omitted).*

The Court ruled insufficient the statement by Secretary Dunlop that:

[b]ased on the investigative findings, it has been determined ... that civil action to set aside the challenged election is not warranted. Id. at 563.

EPA's failure to make virtually all of the determinations required by the

* Whether and when formal findings or statements of reasons may be required as a matter of procedural due process has been a subject of increasing attention since Goldberg v. Kelly, 397 U.S. 254 (1970). In Some Kind of Hearing, 123 U.Pa. L. Rev. 1267 (1975), Judge Friendly has stated:

A written statement of reasons, almost essential if there is to be judicial review, is desirable on many other grounds. The necessity

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CWA and its own Regulations left its grantmaking decisions virtually without

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for justification is a powerful preventive of wrong decisions. Id. at 1292.

In A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 739 (1976), Professor Verkuil states:

A statement of reasons for a decision has long been an essential predicate to judicial review and a concern of due process. Failure by an agency to provide some contemporary statement of reasons for informal decision making places the reviewing court in an unseemly dilemma. The court must either exercise weak review over the informal process and affirm even when in doubt about the basis for the decision or engage in strict review that can involve an unwarranted intrusion into the decision maker's mental processes. Id. at 739 (footnotes omitted).

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findings or a statement of reasons. The burden of searching for findings and reasons was cast upon the reviewing court, and thereby on the plaintiff charged with the burden of proof.

The thwarting of plaintiff on both discovery and trial rendered the imposition upon the plaintiff of finding-the findings task especially egregious in this case. In weighing the significance of the absence of the required findings this Court must, of course, consider the nature of the administrative action brought before the District Court for review. It was

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See also K. Davis, Discretionary Justice: A Preliminary Inquiry, 104:05 (1969); Soafer, Judicial Control of Informal Discretionary Adjudication and Enforcement, 72 Colum. L. Rev. 1293 (1972).

non-adjudicative, non-adversarial. The District was the applicant for the grants and EPA the grantor. Orangetown was in essence an intervenor.

Intervenors have important rights, however. Orangetown's interest in opposing use of over \$100,000,000 of federal grants, to compel it to suffer Clarkstown's and Ramapo's sending their sewage to Orangetown for at least another generation (the "transaction which [was] the subject of the [administrative] action..."), was at least equal to the interests of a party entitled to intervention as of right or permissive intervention in a civil action, under Rule 24 of the Federal Rules of Civil Procedure.

The burden of searching for the findings was, of course, added to the

David versus Goliath type burdens ordinarily cast upon small communities attempting to assert their interests and rights before comparatively massive federal agencies and their grantees. The imposition of the additional burdens was unlawful and unjust.

2. The Court of Appeals ruling that the determinations required by 40 C.F.R. §§ 35.925-1 through 35.925-21 may be in a form other than in writing, is in conflict with applicable decisions of this Court.

The Court of Appeals held that the EPA Regulations "do not require that the agency's actions be set down in any particular order or form, or even that its determinations be made in writing..." (A-24).

It is correct that no particular form is required. The holding that the

determinations need not be in writing must mean, however, that (1) they may be oral or (2) they may be implied by the agency and inferred by a reviewing court.

If they are oral they would appear in the administrative record. They would have to be proven by oral testimony from an official, presumably, testifying "Yes, we made those §§ 35.925-1 through 35.925-21 determinations". Thereupon the official would be subject to cross-examination as to when and by whom they were rendered and other details. The same matters would be within the scope of discovery, by deposition and otherwise, which would be permitted because the bases of the agency's decisionmaking would not be clear from the record. See Overton Park, supra.

The foregoing scenario might be a feasible one in some cases. Plaintiff was not permitted any such inquiry in this case. The District Court forbade such inquiry both on discovery and trial.*

* The barring of such discovery is discussed above. At the trial, the following colloquy between plaintiff's counsel and the court occurred:

The regulations call for specifically certain determinations and rulings by EPA. We have been told that all of those determinations and rulings luck somewhere in all of these boxes.

We have been trying, since the beginning of this action to determine where is which. If no evidence comes out with respect to that, then for your Honor to determine whether those rulings and determinations have been made, your Honor must at the close of

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If determinations or findings may be implied by the agency, the requirement of determinations or findings may, for all practical purposes, be deemed stricken from statute and the regulation. The reviewing court would have to

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this case or at some time go through all of those documents.

. . .

THE COURT: No. I am not going through all of the documents. I am relying on counsel for the government to point out to me where in the documents these rulings, the requirement that there be determinations have been complied with.

MR. SIVE: And that is, your Honor, if they are to point that out to you, then I submit that that should be pointed out to us as part of the case

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search through each document in the administrative record for its implications. In this case, four months after argument of the appeal, the Court of Appeals had to ask EPA counsel to assist it in finding the determinations. EPA's 27 page post-argument letter-brief purported to explain their absence.

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so that we may look at those which they point out and then argue to your Honor they are or are not.

THE COURT: Look, that's not before me at this moment.

What's before me at this moment is whether this witness is to be asked what documents, I take it, he considers to be those. That's what you want to ask him?

MR. SIVE: That's correct.

THE COURT: I already ruled I won't permit that question.

If determinations may be implied by the agency, any requirement by statute or by the agency itself that it make them would have less force than a requirement of a statement of reasons. The requirement of §555(e) of the APA, applicable to on the record and informal agency action, would have greater force than that of §557(c) requiring findings and conclusions in on the record proceedings. The premise leading to such a result must be rejected.

Whether the Court of Appeals holding is deemed to mean that the required determinations may be implied by EPA or may be oral, petitioner submits that it is inconsistent with the rulings of this

Court in Overton Park and Motor Vehicle and other cases.*

3. The Court of Appeals' ruling concerning public controversy decides an important question of federal law which has not been, but should be, settled by this Court.

The District was born in the controversy inherent in one community's sending its sewage to another. The controversy deepened through the years as the County plant emitted massive odors, reshaping life in the areas of

* See also Nader v. NRC, 513 F.2d 1045 (D.C. Cir. 1975); USU Pharmaceutical Corp. v. Secretary of HEW, 466 F.2d 455, 462 (D.C. Cir. 1972); Joseph v. F.C.C., 404 F.2d 207 (D.C. Cir. 1968). Compare with Clermont National Bank v. Citizens Bank National Ass'n, 329 F. Supp. 1331, 1336 (S.D. Ohio 1971) and Sterling National Bank of Davie v. Corp., 431 F.2d 514, 517 (5th Cir. 1970), cert. denied, 401 U.S. 925 (1971).

Orangetown around it. As the District, controlled by Clarkstown and Ramapo, developed its plans, never seriously considering alternatives of treating their own sewage in their own communities, the controversy deepened and broadened. When the District, in or about 1974, determined to double its plant's capacity by using over \$100,000,000 of federal monies, long before the first public meeting held by it concerning the project, the controversy was further aggravated.

The Court of Appeals considered and ruled upon the "Public controversy" aspect of the project. It referred to the rule that the term refers to instances where "a substantial dispute exists as to the size, nature or effect of the major federal action rather than

to the existence of opposition to a use." Hanly v. Kleindienst ("Hanly II"), 471 F.2d 823, 830 (2d Cir. 1972), cert. denied, 412 U.S. 908, subsequent appeal, 484 F.2d 448 (2d Cir. 1973), cert. denied sub nom. Hanly v. Saxbe, 416 U.S. 936 (1974).

The Court of Appeals then, however, applied a different standard for evaluating controversy, ruling that:

"The record lacks a sufficient basis to indicate that the opposition to this project was of such an extraordinary nature as to require an EIS." (A-22).

Neither Hanley II nor Rucker v. Willis, 484 F.2d 158, 162 (4th Cir. 1973) holds that opposition to a project need be "extraordinary in nature" in order to be a factor in determining whether a major project significantly

affects the human environment, thereby requiring an EIS. What is meant by that phrase is also unclear. If it means that the opposition to a project, in order to be a factor in determining whether an EIS should be prepared, must use some unusual means or methods, or arise in some groups of people who would not ordinarily oppose a project, or who are members of some small elite constituency, the "extraordinary" requirement would indeed be counter to decided cases and to sound public policy.

The fact is that the opposition of Orangetown to the project is ordinary in the sense that it is the logical reaction by one community to that of others who want their development but not their sewage, and seek massive federal monies to indulge such wants.

Sewage treatment plants are, of course, inherently undesirable. (A-51). Under the best of circumstances they create problems, including, at times, odors.

The opposition of Orangetown has not used any unusual means or methods to render it extraordinary. It has petitioned the agency, appeared before it, albeit not before the alternative to which it objected was selected by the District, because no opportunity to do so was provided. It has made its case in court. The opposition may be deemed extraordinary in the sense of the numbers and varied groups united in opposition, represented by the Town government exercising its lawful governmental powers.

The Court of Appeals, petitioner submits, applied a criterion not recognized by the prior cases or by the

CEQ Regulations and incompatible with sound public policy.

No Supreme Court case has ruled on the nature or degree of the controversy that may be relevant to the determination of whether an EIS is required. Every litigated proceeding administrative or judicial, raising the issue of the requirement of an EIS reflects controversy. This Court should rule on the matter of public controversy under NEPA.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



No. 1260—August Term, 1982
(Argued April 22, 1983 Decided September 21, 1983)
Docket No. 83-6035



TOWN OF ORANGETOWN,
Plaintiff-Appellant,

—v—

ANNE GORSUCH, Individually and as Administrator of the
United States Environmental Protection Agency;
RICHARD DEWLING, Individually and as Regional Ad-
ministrator of the United States Environmental Pro-
tection Agency; ROCKLAND COUNTY SEWER DISTRICT
No. 1; COUNTY OF ROCKLAND; TOWN OF RAMAPO;
TOWN OF CLARKSTOWN; and ROBERT FLACKE, as Com-
missioner of the New York State Department of En-
vironmental Conservation,

Defendants-Appellees.



Before:

OAKES, PIERCE and PECK,*

Circuit Judges.

Appeal from a final judgment of the United States District Court for the Southern District of New York (Owen, J.) which dismissed plaintiff's action seeking declaratory, injunctive and other relief under the National Environmental Policy Act, the Federal Water Pollution Control Act Amendments of 1972 and the State Environmental Quality Review Act.

Affirmed.

DAVID SIVE, New York City (Laurence B. Jones, Winer Neuburger & Sive, P.C., New York City, of counsel) *for Plaintiff-Appellant Town of Orangetown.*

PETER A.A. BERLE, New York City (Carol A. Buckler, Berle, Butzel, Kass & Case, New York City, of counsel) *for Defendant-Appellees Rockland County Sewer District No. 1, et al.*

GAINES GWATHMEY, Assistant United States Attorney, Southern District of New York (John S. Martin, United States Attorney for the Southern District of New York;

* Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

Thomas D. Warren, Assistant United States Attorney, Southern District of New York; Gary M. Rowan, Assistant Regional Counsel of U.S.E.P.A., of counsel) *for Defendant-Appellee U.S. Environmental Protection Agency.*

MARY LYNDON, Assistant Attorney General for the State of New York (Robert Abrams, Attorney General for the State of New York, of counsel) *for Defendant-Appellee Flacke.*

VINCENT J. ACESTE, Harrison, New York (Alfred E. Page, Clune, White & Nelson, Harrison, New York, of counsel) *for Defendant-Appellee Town of Clarkstown.*



PIERCE, Circuit Judge:

The Town of Orangetown appeals from a final judgment of the United States District Court for the Southern District of New York, Richard Owen, *Judge*, dismissing plaintiff's challenge to the approval by the Environmental Protection Agency (EPA) of construction grants for the design and expansion of the Rockland County Sewer District No. 1 (RCSD) sewage treatment system, and for a portion of the construction costs of said expansion. At the heart of this appeal is the issue of the appropriate scope of judicial review of an administrative agency's decision-making process and the standard against which such decisions are to be measured.¹

¹ For the convenience of the reader, the following abbreviations are set forth:

On appeal, Orangetown's principal contentions are: (1) that the EPA acted unlawfully in failing to prepare an Environmental Impact Statement (EIS) before providing funds for the expansion and design of the RCSD waste treatment system, (2) that the agency acted in violation of its regulations in administering the subject federal construction grant program, (3) that the district court erred in determining that operation of the RCSD plant did not constitute a nuisance and, (4) that the court erred in dismissing plaintiff's New York State Environmental Quality Review Act (SEQRA) claim as barred by the statute of limitations. For the reasons stated hereinbelow, we affirm the district court's dismissal of the complaint.

FACTS

The proposed project against which this action is directed involves the expansion of the sewage treatment plant of the Rockland County Sewer District No. 1. The project entails the expansion of the plant's sewage collection system and the installation of modern odor-control equipment. The waste treatment plant presently services the Rockland County Sewer District No. 1 which covers approximately 80 square miles and provides sewage treat-

CWA	— Clean Water Act or Federal Water Pollution Control Act Amendments of 1972
DEC	— State Department of Environmental Conservation
EA	— Environmental Assessment
EID	— Environmental Information Document
EIS	— Environmental Impact Statement
EPA	— Environmental Protection Agency
I/I	— Infiltration and Inflow
mgd	— million gallons per day
NEPA	— National Environmental Policy Act of 1969
RCSD	— Rockland County Sewer District
SEQRA	— State Environmental Quality Review Act
SSES	— Sewer System Evaluation Survey

ment for 160,000 residents in the Towns of Clarkstown and Ramapo and the Villages of Spring Valley and New Square. Sewage from the district is piped into and treated at the plant's main facility in the Town of Orangetown, New York. Although the County's treatment plant is situated in Orangetown, that town's sewage is treated in its own plant, which is located less than one mile from the County plant.

In recent years, it has become apparent that the RCSD plant is inadequate to meet the area's present and future needs. The already overtaxed plant has experienced several equipment breakdowns and has been allegedly associated with foul and noxious odors. After commissioning a number of waste treatment studies of the plant system, the sewer district sought to expand the capacity of the RCSD plant's sewage disposal system and related piping, modernize its equipment, and repair the present plant facilities.

The existing RCSD sewage treatment plant presently has a design capacity to treat 3,800 cubic meters (10 million gallons per day, or "10 mgd"), but present wastewater flows substantially exceed this quantity. A large part of the excessive flow at the plant is due to the infiltration of groundwater and the inflow of stormwater into the interceptor and collection system.² As part of the

² Infiltration refers to "[w]ater other than wastewater that enters a sewerage system (including sewer service connections) from the ground through such means as defective pipes, pipe joints, connections, or manholes."

Inflow refers to "[w]ater other than wastewater that enters a sewerage system (including sewer service connections) from sources such as roof leaders, cellar drains, yard drains, area drains, foundation drains, drains from springs and swampy areas, manhole covers, cross connections between storm sewers and sanitary sewers, catch basins, cooling towers, storm waters, surface runoff, street wash waters, or drainage." 40 C.F.R. § 35.905.

project presently being proposed, the RCSD treatment plant will be expanded to 8,500 cu m (25 mgd) to handle existing and future sewage flows from the sewer district as well as the infiltration and inflow from groundwater and stormwater. The proposed sewerage system expansion will enable the RCSD to sewer presently unsewered areas of the RCSD, and relieve the burden on the present RCSD plant as well as on numerous smaller municipally and privately owned sewage treatment plants.

In 1976, pursuant to the EPA construction grant program, 40 C.F.R. § 35.900-35.970 (1982), the Town of Ramapo and the RCSD applied to the EPA for funding to initiate a planning process for the modernization and expansion of the RCSD waste treatment plant system.³ The requests for funding were made pursuant to a three-step federal assistance program, the purpose of which is to assist municipalities in constructing waste treatment works. *Id.* § 35.903. Step I Funds pay the partial cost of generating a "Facilities Plan" which outlines the proposed project; Step II Funds pay the partial cost of designing the project; and Step III Funds help defray the costs of actual construction.

In response to the requests for funding, EPA made a grant of Step I Funding to the Town of Ramapo and the RCSD in 1976. During the next four years, a number of waste treatment studies or Sewer System Evaluation Sur-

³ Due to an already overburdened sewerage system, the Town of Ramapo proposes to retire its municipal sewerage facilities and construct a system of gravity and pressure sewer lines to feed into the RCSD system. In this way, the town will provide the sewerage services needed to sewer approximately one third of the town which is presently unsewered. Although the Town of Ramapo has submitted a separate construction grant application for state and federal funding, the town's proposal is a joint undertaking with the RCSD. For purposes of this opinion, the construction projects proposed by the Town of Ramapo and the RCSD will be considered as one project.

veys (SSES) were conducted and a nine-volume Facilities Plan was prepared by the RCSD and the Town of Ramapo. During the development of the various drafts of the Facilities Plan, coordination and exchanges of information were made with consulting engineering firms directly through the RCSD or through various federal and state agencies. Other data used in the planning process were obtained from the Rockland County Planning Board, local municipalities, and surveys of the sewer district and sewer system previously sponsored by state and federal agencies. During the same period, the RCSD held public information meetings and a formal public hearing so that pertinent documentation could be presented for review by the public and various environmental groups.⁴ Based on data derived at the information meetings and public hearing, adjustments to the planning were made. Still further input to the planning process was provided through frequent negotiations between the RCSD, the New York State Department of Environmental Conservation (State DEC) and the Regional Administrator of the EPA. Due to this interaction of parties, the Facilities Plan was the subject of numerous amendments, and other subsequent modifications were incorporated into the facility's design. The record shows exchanges of correspondence indicating that specific proposals were made to both the State DEC and EPA and were given careful

⁴ The record reveals that RCSD conducted several public information meetings between February 14, 1978 and June 4, 1979 in various towns located within the district. Input was sought from the public, environmentalists and various agencies of the town governments within the sewer district. On January 28, 1980, RCSD conducted a formal public hearing. At the hearing, testimony was presented by eight speakers from the Sewer District, local legislators and local officials before the floor was opened for public discussion. Materials received from the public information meetings were incorporated into the facilities planning process.

consideration. For example, the initial location of the administration building was changed to another site to overcome environmental concerns about protecting wetlands. Also, a meeting held August 6, 1980, between the agencies and RCSD led to deletion of a rear access road from the Facilities Plan, while a proposal to build prefabricated ventilated buildings over the first stage of rotating biological disks was included in the Facilities Plan to minimize adverse environmental effects.

The Facilities Plan and related documents were submitted to the State DEC for its review and approval by late summer of 1980, and the State DEC, having worked in concert with the EPA and the applicants to conform the project to federal and state agency standards, certified the Facilities Plan to the Grants Administration Branch of the EPA on August 29, 1980.

Upon receipt of the Step II grant applications from the RCSD and Ramapo, the EPA performed an environmental review of the project. On the same date, the EPA issued a public statement which concluded that the agency had determined that "no significant impact will result from the proposed action."⁵ Consequently, the agency determined not to prepare an Environmental Impact Statement (EIS) before granting construction funds for the project. Instead, the EPA attached to the public notice of "no significant impact," a thirty-four page Environmental Assessment (EA), which described the facilities planning area of the project, set forth the purpose of and need for the project, identified the selected plan and its costs, evaluated the environmental conse-

⁵ The EPA was able to issue its finding of no significant impact on the same day as the state certification because RCSD had already submitted its preliminary grant application for consideration pursuant to 40 C.F.R. § 35.920-2(b).

quences of the various alternatives to expanding the present plant system and listed, *inter alia*, the projected effects on wetlands, floodplains, vegetation, and sedimentation. The EA also outlined the steps taken to minimize adverse environmental consequences and listed the Special Grant Conditions which would be attached to any federal construction grants in order to protect environmentally sensitive areas from development.

On September 30, 1980, the EPA offered a Step II design grant to the RCSD in the amount of \$2,858,627 and to Ramapo in the amount of \$505,950. The grants were accepted by both applicants in November, 1980. However, before the RCSD could apply for Step III construction funding, the Town of Orangetown commenced the instant action challenging the EPA's environmental processing of the applications. Plaintiff's amended complaint asserted five causes of action primarily seeking declaratory and injunctive relief. The first claim alleged that the environmental processing of the RCSD project violates the National Environmental Policy Act (NEPA); the second claim alleged that the award of Step II grants violates the Clean Water Act (CWA); the third claim alleged that the state and local defendants violated the State Environmental Quality Review Act (SEQRA) by unlawfully treating the project as excluded from the requirements of that Act; and the fourth and fifth claims sought injunctive and monetary relief for the improper operation of the County plant, which plaintiff alleged to be a nuisance.⁶ In their answers, RCSD and

⁶ At the start of trial, Orangetown obtained leave to amend the complaint to allege a sixth cause of action which reflected the fact that during the pretrial proceedings, EPA awarded the project a Step III, Phase I grant. The sixth claim alleges the same violations as those alleged with respect to the Step II grants and claims that EPA's issuance of the Step III, Phase I grant violates NEPA and EPA's regulations.

Ramapo asserted counterclaims seeking injunctive and monetary relief and alleged that Orangetown's own sewerage treatment plant constituted the nuisance in the area.

At pretrial proceedings, the district court granted the State DEC's motion to dismiss the third (SEQRA) claim as barred under the applicable state statute of limitations.⁷ Trial on the nuisance issues and EPA's finding of no significant impact began on October 12 and continued until October 27, 1982. Upon completion of the plaintiff's case, the district court dismissed the fifth claim as against the County Defendants and EPA, and the fourth claim as against the State DEC and EPA for failure to state a claim upon which relief could be granted.⁸

On January 24 and 25, 1983, the district court issued findings of fact and conclusions of law on the NEPA, CWA and nuisance claims before dismissing the counterclaims and plaintiff's complaint in its entirety. Specifically, the court denied the relief sought after finding that, based upon the administrative record, the EPA had considered the relevant environmental factors in determining that the project would not have a significant impact on the environment. The court also concluded that EPA's action in approving the Step II and Step III, Phase I grants fully complied with NEPA and CWA provisions, as well as the EPA's construction grant regulations. In addressing the nuisance claims, the court found that the

⁷ At the completion of the plaintiff's case, the district court granted a similar motion by the County Defendants and dismissed the third cause of action in its entirety.

⁸ At the commencement of trial, and following plaintiff's opening statement, the district court dismissed plaintiff's nuisance claims against the Town of Clarkstown because plaintiff had failed to allege that Clarkstown had control over the operation of the County plant.

evidence presented did not support a finding that either plant constituted a public nuisance.

DISCUSSION

On January 1, 1970, the National Environmental Policy Act (NEPA) was enacted to promote a national policy which would "encourage productive and enjoyable harmony between man and his environment." 42 U.S.C. § 4321 (1976). To achieve this national policy, NEPA requires that federal agencies proposing "major Federal actions significantly affecting the quality of the human environment" include in their proposals or recommendations an EIS which provides an assessment of the beneficial and adverse environmental impacts of the proposed action. *Id.* § 4332(2)(C). An EIS is evidence that an agency has considered the reasonably foreseeable environmental effects of a proposed major action before making a decision to take the action. However, no EIS is required where the major federal action is not "significant" within the meaning of NEPA. *Hanly v. Kleindienst*, 471 F.2d 823, 830 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973) ("Hanly II"); *Hanly v. Mitchell*, 460 F.2d 640, 644 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972) ("Hanly I"). Essential to the outcome herein is the determination whether the EPA erred in deciding that providing partial funding for the modernization and expansion of the RCSD sewage treatment system will not "significantly" affect the quality of the human environment in Rockland County Sewer District No. 1 and, in particular, in the Town of Orangetown.

Scope Of Review

The issue of whether a particular agency's action will have a "significant" effect on the environment is a substantive issue which has traditionally been left to the informed discretion of the agency proposing the action or project. *Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011, 1029 (2d Cir. 1983). See also *Scenic Hudson Preservation Conference v. Federal Power Commission*, 453 F.2d 463, 480 (2d Cir. 1971) ("[T]he resolution of highly complex technological issues such as these was entrusted by Congress to the [agency] and not to the courts."), *cert. denied*, 407 U.S. 926 (1972). NEPA does, however, provide a procedural framework within which substantive judgments must be made. The courts must ensure that agencies comply with the "procedural duties" mandated by NEPA, *Kleppe v. Sierra Club*, 427 U.S. 390, 406 & n.15 (1976), while still assuring compliance with the substantive purposes of that Act.

Orangetown argues that the EPA is required to prepare an EIS which would highlight what Orangetown perceives to be the significant environmental impacts of that agency's decision to grant funds for the RCSD modernization and expansion project. Orangetown contends that the EPA has not adhered to the procedural framework dictated by NEPA, and that its finding of "no significant impact" was arbitrary and capricious.

EPA's determination of "no significant impact" is neither a rulemaking nor an adjudicatory function, but rather a factual finding made by an agency with particular expertise in environmental matters. The appropriate scope of review is therefore prescribed by the Administrative Procedure Act (APA), which provides that agency action may be overruled by a court only if the agency action was "arbitrary, capricious, an abuse of discretion,

or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1976); see also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971); *City of New York v. United States Department of Transportation*, slip op. at 5730 (2d Cir. Aug. 10, 1983); *Cross-Sound Ferry Service, Inc. v. United States*, 573 F.2d 725, 729 (2d Cir. 1978); *Hanly II*, 471 F.2d at 828-29.

In *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980) (per curiam), the Supreme Court addressed the question of the scope of review of agency decisions on environmental issues. Although the holding of the case is limited to the question of whether NEPA requires the agencies to elevate environmental concerns over other legitimate concerns, the Court quoted from *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978), in finding that, under NEPA, the judicially reviewable duties that are imposed on agencies are "essentially procedural," and that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences." 444 U.S. at 227. The court cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken." *Kleppe v. Sierra Club*, 427 U.S. at 410 n.21 (quoting *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)).

Recognizing the limits of our review herein, we understand the "procedural" requirements of NEPA to be the guidelines with which this court must assess the kinds of relevant environmental factors that must be weighed. We must, therefore, look to see whether the environmental impact assessment contains the type of reasoned elaboration required to support the agency's determination of no

significant impact. In short, the appropriate role of the court is to ensure that EPA has taken a "hard look" at the environmental consequences which are likely to result from the RCSD modernization and expansion program, to be attuned to whether the EPA has considered the relevant areas of environmental concerns, and to assess whether the agency has convincingly documented its determination of "no significant impact." See e.g., *Maryland-National Capitol Park & Planning Commission v. U.S. Postal Service*, 487 F.2d 1029, 1040 (D.C. Cir. 1973).

I. Finding of No Significant Impact

Orangetown contends that an EIS should have been prepared by EPA because of specific impacts which it believes federal funding will have in causing a significant effect on the environment. It claims that the EPA's failure to assess, or in some instances, to more adequately assess, these impacts constituted an abuse of discretion. Specifically, Orangetown points to several matters which it claims were not given adequate consideration by the EPA: the project's impact on wetlands, floodplains, and land use; the project's alleged inadequate design; and consideration of the controversial nature of the project. These claims will be examined *seriatim*.

A. Wetlands

Orangetown claims that the sewage treatment plant modernization and expansion project will have a "significant adverse effect" on wetlands and floodplains in the area of the plant expansion and along the system of piping where new interceptors and collector sewers will be placed. In support of its contention that an EIS is required, Orangetown cites the EPA's own Review Proce-

dures for Wastewater Treatment Construction Grants Program, 40 C.F.R. § 6.506(a)(2), which requires the responsible official of the EPA to ensure that an EIS will be issued when “[t]he treatment works or collector system will have significant adverse effects on wetlands, including indirect effects, *or any major part of the treatment works will be located on wetlands.*” *Id.* (emphasis added). Orangetown contends that the administrative record contains no reference to the fact that a major part of the new construction for the project, including the grit tanks and chambers, digested sludge storage, sludge and grit handling buildings, new primary settling tanks and pumping stations, will be on land which appellant’s expert claims to be wetlands.

However, the proposed area to be affected by construction of the plant expansion has not been designated as a “wetlands” area by the EPA. 40 C.F.R. Part 6 App. A § 6(a)(1) provides in relevant part:

(1) *Floodplain/Wetlands Determination*—Before undertaking an Agency action, each program office must determine whether or not the action will be located in or affect a floodplain or wetlands. The Agency shall utilize maps prepared by the Federal Insurance Administration . . . Fish and Wildlife Service . . . *and other appropriate agencies* to determine whether a proposed action is located in or will likely affect a floodplain or wetlands.

Id. (emphasis added). Under New York State law, the State DEC is the responsible “agency” for the supervision and protection of wetlands and is charged with preparing detailed maps of wetlands as part of this responsibility. See 6 N.Y.C.R.R. §§ 664.1, 664.7 (1980). As the Facilities Plan indicates, the State DEC has not designated the

affected area as a "wetlands." Thus, the EPA did not err in not issuing an EIS since a major part of the proposed addition to the RCSD treatment works will not be located on "wetlands" as defined by an appropriate federal or state agency.

Orangetown contends that regardless of whether the State DEC has designated the area to be a wetlands, the proposed area, populated with reeds, flooded shrubs and wooded live deciduous trees, is nonetheless a wetlands area. Orangetown further suggests that the State DEC has not designated the area as a wetlands because the affected area will be less than 12.4 acres and has not been defined as an area of "unusual local importance," both factors to be considered by the State DEC in designating areas as wetlands. *See 6 Id.* §§ 662.2(a), 662.4(b) (1976). However, our review of the administrative record reveals that the EPA was notified in the Facilities Plan of the "wetlands species" in the area, as well as of the relatively small size of the affected area. *See EPA exh. D4, VII-2.* Under these circumstances, and in light of the fact that the State DEC has not found the area to be of "unusual local importance," and did not designate the area as a wetlands, EPA cannot be faulted for failing to issue an EIS solely because of the wetlands effect.

We note that the Facilities Plan also indicates that a substantial area surrounding the plant has already been "disturbed" by the existing RCSD plant. As this court stated in *Hanly II*, while both the absolute and comparative effects of an agency's actions must be evaluated, it must be recognized that "[w]here conduct conforms to existing uses, its adverse consequences will usually be less significant than when it represents a radical change. . . . One more highway in an area honeycombed with roads usually has less of an adverse impact than if it were

constructed through a roadless public park." 471 F.2d at 831. Moreover, the administrative record herein indicates that principally, new interceptors were routed to follow existing rights of way and are to be placed along routes already disturbed by roadways or existing piping. See, e.g., EPA exh. D3, Plates V-12, V-13. In this way, the project was designed to minimize the wetlands impact due to expansion of the sewerage system.

Finally, the record reveals that the RCSD redesigned the plant's specifications to comply with the EPA's insistence on reducing wetlands impacts. See Memorandum of EPA Life Scientist Peter Gruber, May 27, 1980, EPA exh. D36; see also EA at 9, Plaintiff's exh. 4. In short, EPA specifically analyzed the wetlands impact of the entire project, and then determined that the wetlands affected would not be significant enough to mandate preparation of an EIS. We do not find this to be an arbitrary or capricious decision.

B. Floodplains

Orangetown contends that no consideration was given by EPA to encroachment of the county plant on a nearby floodway, and that pursuant to 40 C.F.R. § 6.506(a)(4), issuance of an EIS was required. That section provides that an EIS is required where implementation of a project may directly cause or induce changes that significantly "[a]dversely affect a floodplain." This argument is devoid of merit. The EPA administrative record reveals that the actual encroachment on the floodway involves only a small portion of two buildings. See EPA exh. D6. It would be difficult to conclude that this *de minimis* intrusion onto the floodway could "significantly adversely affect a floodplain." The EA also indicates that EPA considered the project's effect on floodplains, and noted

with approval RCSD's efforts to route the interceptors and collectors in such a way as to avoid nearby floodplains. See EA at 8, Plaintiff's exh. 4. These circumstances do not suggest that EPA ignored the project's effect on floodplains and wetlands, or that the EPA abused its discretion by determining that the wetlands and floodplains impact of this project did not warrant preparation of an EIS. See *Parsippany-Troy Hills v. Costle*, 503 F. Supp. 314 (D.N.J. 1979), *aff'd mem.*, 639 F.2d 776 (3d Cir. 1980).

C. Land use impacts

Orangetown argues further that the land use impacts of the project are so significant that an EIS should have been prepared. EPA's regulations require that an EIS be issued if the treatment works will "induce significant changes . . . in . . . residential land use concentration and distribution." 40 C.F.R. § 6.506(a)(1). Apparently, Orangetown contends that expansion of the RCSD sewage treatment plant will *automatically* provide pressure for development in what is now undeveloped lands in the Town of Ramapo. Appellant's assertion lacks a substantial basis in the record and does not provide a ground to require the issuance of an EIS.

The Facilities Plan reviewed by the EPA defined in detail the scope of the project within the constraints of existing zoning regulations and contains zoning maps for the communities affected by either the plant expansion or the routing of interceptors, collectors and pipes. The Facilities Plan also contains a review of the demographic characteristics of the affected area and projected anticipated growth of the communities. Based on this information, the EPA found that the project was designed only to meet population growth expected to occur in the sewer

district, and noted in the EA that sewers were to be installed only in places where development was already taking place or was anticipated. The EA states that:

[t]he population of the planning area is projected to increase from approximately 160,000 to 201,000 over the 20 year design period of the proposed sewerage facilities. The population projections are based on recent development plans, zoning, and a constraints analysis which excluded environmentally sensitive areas (such as wetlands, floodplains, agricultural lands and step [sic] slopes) from development.

EA at 2, Plaintiff's exh. 4. Based on the available information, the EPA concluded in the EA that although the project "may" cause an increase in the rate of development, such an increase was not sufficiently significant to require the preparation of an EIS.

Appellant has not established that expansion of the sewage treatment system will encourage a significant increase in development rather than merely meet the district's presently overburdened needs and anticipated growth. It is possible that Orangetown's position would have been stronger had it established at trial that the projected capacity of the new sewage collection system greatly exceeded the required capacity for anticipated growth. Appellant might then argue that grossly excessive capacity would be an inducement to developers to utilize the undeveloped lands and to tap into the collection system. In light of the lack of sufficient evidence to indicate that there would be excessive capacity under the approved plan, and that the plant expansion would have the effect of inducing a significant change in land development, EPA did not abuse its discretion in not issuing an EIS. See *City of New York v. United States Department*

of *Transportation*, slip op. at 5726 n.14 ("The fact that effects are only a possibility does not insulate the proposed action from consideration under NEPA, but it does accord an agency some latitude in determining whether the risk is sufficient to require preparation of an EIS."); See also *Township of Parsippany-Troy Hills v. Costle*, 503 F. Supp. at 324.

D. Sewage Treatment Plant Design

Orangetown argues that the capacity of pipes carrying effluent to the sewage treatment plant (inflow) and the capacity of the discharge pipe which carries treated effluent from the plant to the Hudson River (outflow) are insufficient, and that this state of affairs will cause raw sewage to spew into the streets and streams of Orangetown. This alleged miscalculation has been criticized by appellant as further proof that EPA's finding of no significant impact was arbitrary and capricious. However, both claims are without merit.

The Facilities Plan contemplates peak flow through the plant of 53 mgd by the year 2000. However, an interim SSES study commissioned by the RCSD, and completed before issuance of the finding of no significant impact, estimated that the maximum influent in the year 2000 could reach 54.6 to 57.6 mgd. As the Facilities Plan explains, the estimated amount of a sewer pipe flow is composed of numerous variables including projected elimination of infiltration and inflow, demographic patterns and the constantly changing ways in which a community uses its water. Under these circumstances, EPA's utilization of the 53 mgd figure at the Facilities Planning stage cannot be said to be arbitrary given the relatively small difference between the two estimates of maximum

flow in the year 2000 (53 mgd as against 54.6-57.6 mgd, or 2.6% to 8.7% variance).

With regard to the outfall pipe, Orangetown contends that the 102 mgd capacity of the outfall pipe, which is shared by the Orangetown and RCSD plants, is insufficient. However, examination of the administrative record and testimony at trial reveals appellant's argument to be a non-issue.

The Facilities Plan states that the joint outfall pipe has a capacity of 102 mgd. By contract, 42 mgd is allotted to the Orangetown plant and 60 mgd to RCSD. As Orangetown correctly states, a 1982 study commissioned by RCSD estimates that projected flow in the year 2030 could, under certain circumstances, exceed the outfall pipe's capacity of 102 mgd, and could reach as high as 104 mgd. However, this state of affairs seems unlikely to occur since the record reveals that Orangetown's total plant overflow is currently 6.95 mgd, and the projection for maximum outflow is 15.5 to 17 mgd in the year 2000. Without a significant expansion of Orangetown's own sewage treatment plant, the outflow pipe will not reach its designed capacity. Moreover, an expert in wastewater flow whose firm conducted the 1982 study testified at trial that, based on the projected flows from the Orangetown plant, there was no possibility of excess flow until at least the year 2030. Under these circumstances, we do not find that EPA acted arbitrarily in concluding that the project's design would not significantly affect the environment.

E. Public Controversy

Orangetown argues that an EIS is required because of local opposition to the plant expansion project. Opposition and a high degree of controversy, however, are not synonymous. It is to be expected that expansion of an

unpopular sewage treatment plant would generate a considerable degree of opposition; however, the term "highly controversial" as found in 40 C.F.R. § 1508.27(b)(4) (which outlines factors to be assessed in determining the "intensity" of a project, including "[t]he degree to which the effects on the quality of the human environment is likely to be highly controversial") refers to instances where "a substantial dispute exists as to the size, nature or effect of the major federal action rather than to the existence of opposition to a use." *Hanly II*, 471 F.2d at 830. To hold otherwise "would require an impact statement whenever a threshold determination dispensing with one is likely to face a court challenge [and would] surrender the determination to opponents of a federal action, no matter whether [the project is] major or not, nor how insignificant its environmental effects might be." *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973); see also *Hanly II*, 471 F.2d at 830 n.9A; *Fund for Animals v. Frizzell*, 530 F.2d 982, 988-89 n.14 (D.C. Cir. 1975). In light of the evidence herein supporting a finding of no significant impact, something more than the mere speculation that the plant expansion will increase odor problems, rather than alleviate such existing problems, is necessary before a project can be called "highly controversial." The record lacks a sufficient basis to indicate that the opposition to this project was of such an extraordinary nature as to require an EIS.

Upon examination of the administrative record relied upon by the EPA, and that agency's findings as published in the EA, we find that the EPA considered the relevant data, investigated the relevant environmental concerns, and concisely documented the evidence supporting its conclusion that funding for the RCSD system expansion would not have a significant effect on the environment.

Since the challenged findings are supported by substantial evidence, are not arbitrary and capricious, and do not represent an abuse of discretion, it is not within the competence of this court to overrule the agency's determination. See *City of New York v. United States Department of Transportation*, slip op. at 5723, 5730; *Morningside Renewal Council, Inc. v. United States Atomic Energy Commission*, 482 F.2d 234, 238 (2d Cir. 1973); *Scenic Hudson Preservation Conference v. Federal Power Commission*, 453 F.2d 463, 468 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972).

II. Procedural Compliance With Construction Grant Program

Orangetown next contends that EPA violated its regulations governing the construction grant program by omitting certain procedural steps and by not requiring compliance with the procedural aspects of the program prior to issuance of the Step II and Step III, Phase I grants. Upon careful examination of the record, we find that RCSD, as grantee, complied with the "public participation" requirements of 40 C.F.R. § 35.917-5 (1977) by holding timely public information meetings and a formal hearing; that the public had adequate opportunity to participate in the planning process; that the Facilities Plan was submitted to the State DEC, and that the State certified the Facilities Plan prior to submitting the Plan to the EPA pursuant to 40 C.F.R. §§ 35.917-7, 35.917-8; that the EA contains a wetlands/floodplains assessment; that since the Facilities Plan was commenced prior to December 15, 1979, an Environmental Information Document (EID) was not required to be prepared;⁹ that the

⁹ See 40 C.F.R. § 6.102(c)(2).

Facilities Plan had been approved by the EPA prior to the grant of Step II Funds; that the Step II grant applications from RCSD and the Town of Ramapo were filed with the EPA; and that the EPA reviewed these applications and awarded Step II Funds to the applicants.

Orangetown contends that EPA failed to assess and make specific findings required by 40 C.F.R. §§ 35.925-1 through 35.925-21.¹⁰ These sections set forth a series of conditions that EPA must find to exist prior to the award of a grant under the construction grants program for sewage treatment works. We note, however, that while a clear and concise document outlining *seriatim* the agency's response to the demands of Section 35.925 would be of considerable assistance to a court's review of EPA's actions, the regulations do not require that the agency's actions be set down in any particular order or form, or even that its determinations be made in writing.

¹⁰ Only three of the 21 determinations were contested in the district court. Plaintiff's amended complaint only challenged compliance with subdivisions 35.925-7 ("Design"), 35.925-8 ("Environmental Review"), and 35.925-13 ("Sewage Collection System"), as determinations which the Regional Administrator had failed to properly address prior to an award of construction grant funds. These three issues were among Orangetown's claims as the action proceeded to trial. More than two months after completion of the trial, on January 6, 1983, Orangetown moved pursuant to Fed. R. Civ. P. 15(b) to conform its pleadings to the proof adduced at trial to place in issue the claim that EPA "did not make the determinations required by 40 C.F.R. § 35.925." On January 24, 1983, the district court denied the motion. Since inclusion of the 17 remaining determinations of Section 35.925 were not tried by the parties' express or implied consent, and were not presented in such a way that the defendants could fairly "defend. . . [and] offer any additional evidence if the case were to be retried on a different theory," *Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1086 (2d Cir. 1977) (quoting 3 Moore's *Federal Practice* ¶ 15.13[2], at 993 (2d ed. 1966)), we find the district court did not abuse its broad discretion in denying the motion. "The purpose of Rule 15(b) is to allow the pleadings to conform to issues actually tried, not to extend the pleadings to introduce issues inferentially suggested by incidental evidence in the record." *Browning*, 560 F.2d at 1086.

All that is necessary is that a reviewing court be able to trace from the written record the path followed by the agency in deciding to take a particular action. *See generally Bowman Transportation, Inc. v. Arkansas Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). Our review of the EPA administrative record supports the district court's finding that "[t]aken as a totality the administrative record reflects that the objectives of 40 C.F.R. § 35.925 were accomplished and [that] therefore EPA complied with its terms."

III. Nuisance Claim

Orangetown claims that the district court committed clear error in dismissing its public nuisance claim against the County defendants. We find the district court correctly dismissed appellant's nuisance claim.

Orangetown alleged at trial that operation of the County plant constituted a nuisance by virtue of its frequent equipment failures, which allegedly caused foul and noxious odors to permeate the air. After conducting a non-jury trial, the district judge concluded that *both* the Town and County waste treatment plants had generated offensive odors. Since the two plants are situated within 1800 feet of each other, the district judge found he could not conclude that the odors emanating from one plant alone created a "significant and unreasonable interference with public rights." *See, e.g., Copart Industries, Inc. v. Consolidated Edison Co.*, 41 N.Y.2d 564, 362 N.E.2d 968, 394 N.Y.S.2d 169 (1977); *New York Trap Rock Corp. v. Town of Clarkstown*, 299 N.Y. 77, 85 N.E.2d 873 (1949).

Both parties offered evidence at trial from lay and expert witnesses that the other party's waste treatment plant was poorly operated and emitted foul odors.

Further, several witnesses testified that they were not prepared to identify which of the plants was the source of the odors they had experienced. The district court credited this testimony and concluded that it could not make an unequivocal finding of causation. Therefore, the district judge dismissed plaintiff's nuisance claim. From our review of the evidence presented at trial, we find no basis for overturning the district court's ruling that Orangetown's evidence, taken as a whole, failed to prove by a preponderance that the county plant operation resulted in a public nuisance.

IV. SEQRA Claim

Orangetown contends that the district court erred in dismissing its third cause of action which sought to enjoin the State DEC from granting the state portion of construction funding for the RCSD sewage treatment plant expansion. Appellant's third cause of action alleges that the State DEC did not comply with the requirements of SEQRA by granting state funds and certifying the project for federal funding, without requiring that an EIS be prepared.

The district court found that Orangetown's SEQRA challenge was a claim against a New York State agency and thus was governed by the statute of limitations as set forth in N.Y. Civ. Prac. Law § 217 (McKinney 1972).¹¹

¹¹ N.Y. Civ. Prac. Law § 217 provides:

Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty; or with leave of the court where the petitioner or the person whom he represents, at the time such determination became final and binding upon him or at the time of

The court dismissed the SEQRA claim against the State DEC on July 26, 1982, and wrote:

Plaintiff's third claim for relief raises a state law issue. Where state created rights are being contested, the limitations period is governed by state statute. *See, e.g., Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). In this instance, the appropriate statute is section 217 of the New York Civil Procedure Laws and Rules which allows that proceedings against a state officer must be commenced "within four months after the determination to be reviewed becomes final and binding"

On September 11 and 12, 1980, the state defendants submitted and certified the application attendant to the Orangetown plant to the Grants Administration Branch of the EPA. That activity concluded the state defendant's obligations pursuant to SEQRA, and the commencement of the action in February, 1981, was beyond the statute of limitations. The claim is therefore barred. *Reisel, Inc. v. Exxon Corp.*, 349 N.Y.S.2d 14, 20 (2d Dept. 1973), *aff'd*, 36 N.Y.2d 888 (1975).

Because we find the determination of the district court to be correct, we affirm the dismissal of appellant's third cause of action against the State DEC.

Appellant's complaint, filed February 26, 1981, was filed approximately five months after the State DEC's approval of RCSD's Step II grant application. Orangetown argues, however, that its late filing should be no bar since a challenge to a SEQRA determination is not

such refusal, was under a disability specified in section 208, within two years after such time.

(emphasis added).

reviewable under a CPLR Article 78 proceeding. Appellant further contends that the district court misinterpreted its third cause of action, which it alleges is actually a claim for injunctive and declaratory relief, and that thus, a six-year statute of limitation should be applied. This argument is without foundation or merit.

CPLR Section 217, or Article 78 proceedings, are applicable to final state determinations under SEQRA. See, e.g., *In re Town of Yorktown v. New York State Department of Mental Hygiene*, 92 A.D.2d 897, 459 N.Y.S.2d 891 (2d Dept. 1983); *In re State of New York Northeastern Queens Nature and Historical Preserve Commission v. Flacke*, 89 A.D.2d 928, 453 N.Y.S.2d 773 (2d Dept. 1981). Therefore, Orangetown's challenge to the State DEC certification was required to be made within four months of that agency's final determination.

Orangetown also errs in assuming that it can avoid the applicable bar by labeling its action as one seeking declaratory or injunctive relief. New York law requires its courts to look to the substance of a claim to determine which statute of limitations applies. If this examination reveals that a claim for declaratory relief could have been resolved through another form of action which has a specific limitations period, the specific period of time will govern. See *Press v. County of Monroe*, 50 N.Y.2d 695, 409 N.E.2d 870, 431 N.Y.S.2d 394 (1980); *Solnick v. Whalen*, 49 N.Y.2d 224, 401 N.E.2d 190, 425 N.Y.S.2d 68 (1980). Therefore, we find appellant has not complied with the applicable specific four month statute of limitations period provided in N.Y. Civ. Prac. Law § 217, and we affirm the district court's dismissal of the third cause of action accordingly.

The judgment is affirmed in all respects. Each party shall bear its own costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TOWN OF ORANGETOWN,

Plaintiff,

-against-

ANNE GORSUCH, Individually
and as Administrator of
the United States Environ-
mental Protection Agency;
RICHARD DEWLING, Individual-
ly and as Regional Admini-
strator of the United States
Environmental Protection
Agency; ROCKLAND COUNTY SEWER
DISTRICT NO. 1; COUNTY OF
ROCKLAND; TOWN OF RAMAPO;
TOWN OF CLARKSTOWN; NEW YORK
STATE DEPARTMENT OF ENVIRON-
MENTAL CONSERVATION; and
ROBERT FLACKE, as Commission-
er of the New York State De-
partment of Environmental
Conservation,

Defendants.

81 Civ. 1147 (RO)

THE COURT'S FINDINGS OF FACT AND
CONCLUSIONS OF LAW

FINDINGS OF FACT*

1. This is an action brought by the Town of Orangetown against Rockland County, the Rockland County Sewer District No. 1 ("RCSD"), the Town of Ramapo, the New York State Department of Environmental Conservation ("DEC") and the United States Environmental Protection Agency ("EPA") to enjoin the expansion of a sewage treatment plant and related sewage piping.

2. The objectives of the project, which has been undertaken by RCSD with EPA grant assistance, are the improvement of water quality in the area, the decrease of harmful characteristics of

* The fact that certain proposed findings herein were excised by the Court does not mean that they were rejected or that there was no evidence to support them but merely that they were not deemed necessary for the disposition in the case.

effluent discharged into the Hudson River, and the upgrading of RCSD's plant in Orangetown.

3. RCSD comprises approximately 80 square miles in area and constitutes approximately one half of the County. The population of the area served by the district is approximately 160,000. RCSD provides sewage service to residents in the townships of Clarkstown and Ramapo and the Villages of Spring Valley and New Square.

4. Paragraph omitted.

5. It has been apparent for a number of years that the capacity of the RCSD plant is insufficient to meet the area's present and future needs.

6. Paragraph omitted.

7. The plant also experienced odor problems and other operational difficulties.

8. Paragraph omitted.

9. Because of the foregoing, RCSD has needed to expand the capacity of its sewage disposal system and related piping and update its facilities.

10. RCSD and the Town of Ramapo applied to EPA for funding to initiate a planning process for an expanded wastewater treatment work, interceptor system and collection system in 1976. Facilities planning grants to both applicants were made later that year.

11. The process by which facilities plans were prepared extended over a four-year period and involved EPA, DEC and RCSD. RCSD and the Town of Ramapo hired a number of consultants to aid in the accomplishment of this task. The administrative record contains Facilities Plans, a Sewer System Evaluation

Survey, and studies of engineering and environmental aspects of the project.

12. The Facilities Plans were submitted to EPA in draft. Thereafter, numerous amendments of the proposal were accomplished. A number of design changes were instituted specifically to answer EPA's concerns relating to environmental impacts.

13. Between 1976 and 1980, public meetings and one public hearing concerning the project were held. Plaintiff participated actively in this process.

14. Paragraph omitted.

15. The New York State Department of Environmental Conservation approved the Facilities Plan on August 29, 1980.

16. EPA notified the public that, in accordance with the procedures for the preparation of environmental impact

statements (under the National Environmental Policy Act, 42 U.S.C. §4332), it had reviewed the project, and issued a Finding of No Significant Impact ("FNSI"). Attached to the public notice was the agency's Environmental Assessment ("EA"). The agency further stated that no action would be taken on the project for at least 30 days after the date of the FNSI.

17. The EA described the facilities planning area and the project in detail, set forth the purpose of and need for the project, identified the selected plan and its costs, evaluated various alternatives, described the environmental consequences of the plan and the steps to minimize adverse environmental effects and stated various grant conditions to accomplish minimization of environmental consequences.

18. The EA evaluated whether the project would induce significant population changes and concluded only that the proposed project "may" cause an increase in the rate of development, however of serving that the plan calls for sewers in areas already developed or with an already strong potential for development. The EA concluded that there would be no significant land use effects (and no significant secondary air, water and wildlife effects through induced development). Special grant conditions eliminating adverse land use consequences were listed. Wetlands effects were evaluated with great care as were issues relating to interbasin transfer and odor control.

19. On September 12, 1980, RCSD and Ramapo submitted their formal Step II

grant applications to EPA and the agency approved them on September 30, 1980.

20. Paragraph omitted.

21. Paragraph omitted.

22. Paragraph omitted.

23. Paragraph omitted.

23. Paragraph omitted.

25. Paragraph omitted.

26. Paragraph omitted.

29. Paragraph omitted.

30. Paragraph omitted.

31. Paragraph omitted.

32. All sewage treatment plants can be expected to generate some local opposition. This proposed plant was no exception. I do not, however, find it to be controversial in the legal sense.

33. Paragraph omitted.

34. The administrative record demonstrates that EPA appropriately considered whether the project provides for the best practicable waste treatment

technology, whether the project has sufficient reserve capacity, whether the design, size and capacity of the project are cost effective, whether the sewer collection system is subject to excessive infiltration, whether the sewage collection system has sufficient capacity as planned to adequately treat the collected sewage, whether the sewage collection system is cost effective, whether the sewage compositing proposed was appropriate and whether the environmental review of the project complied with the requirements of NEPA.

- 35. Paragraph omitted.
- 36. Paragraph omitted.
- 37. Paragraph omitted.
- 38. Paragraph omitted.
- 39. Paragraph omitted.
- 40. Paragraph omitted.

THE LAW

41. Section 102(2)(C) of NEPA, 42 U.S.C. §4332(2)(C), requires a federal agency to prepare an environmental impact statement ("EIS") for every major federal action significantly affecting the quality of the human environment. No EIS is required, however, unless the major federal action is "significant" within the meaning of NEPA, see 42 U.S.C. §4332(2)(C); Hanly v. Kleindienst, 471 F.2d 823, 830 (2d Cir. 1972), cert. denied 412 U.S. 908 (1973) ("Hanly II"); Hanly v. Mitchell, 460 F.2d 640, 644 (2d Cir. 1972) ("Hanly I").

42. In order to prevail, plaintiff must prove that the EPA's decision not to prepare an EIS was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure re-

quired by law," see Cross-Sound Ferry Service, Inc. v. United States, 573 F.2d 725, 731 (2d Cir. 1974); see also Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973); Hanly v. Kleindienst (Hanley II), 471 F.2d 823, 828-29 (2d Cir. 1973), cert. denied, 412 U.S. 908 (1973); see also 5 U.S.C. §701 et seq.

43. This is a "highly deferential standard" which "presumes agency action to be valid." Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 34 (D.C. Cir. 1976), cert. denied, 426 U.S. 941 (1976); see also Citizens to Preserve Overton Park, supra, 401 U.S. at 415.

44. In determining whether a major federal action significantly affects the environment, the district court should review whether the agency, in exercising

its broad discretion considered factors such as

(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area. Hanly v. Kleindienst, supra, 471 F.2d at 830.

45. EPA is presumed to have considered all the material before it prior to the award of the challenged Step II grant. See Natural Nutritional Food Association v. FDA, 491 F.2d 1141, 1145-46 (2d Cir.), cert. denied, 419 U.S. 874 (1974). See also Yaretsky v. Blum, 629 F.2d 817, 823 n.4 (2d Cir. 1980), cert. granted, ____ U.S. ____ (1981).

46. Thus, the court's role is to insure that EPA has taken a "hard look"

at the environmental consequences which are likely to result from the project, determine whether EPA has identified "the relevant areas of environmental concern" and whether the agency has convincingly supported its determination that any impacts are insignificant or that program changes have rendered potentially significant impacts insignificant.

47. Plaintiff bears the burden of proof on each of these issues. Sierra Club v. Lynn, 502 F.2d 43, 52 (5th Cir. 1974), cert. denied, 421 U.S. 994 (1975); Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421, 425 (5th Cir. 1973); Simmons v. Grant, 370 F. Supp. 5, 12 (S.D. Tex 1974).

48. Finally, in its review, the district court is not empowered to substitute its judgment for that of the agency, Vermont Yankee Nuclear Power

Corp. v. NRDC, 435 U.S. 519 (1978);
Kleppe v. Sierra Club, 427 U.S. 390, 410
n. 21 (1976).

49. If EPA has considered the relevant factors and reached a conclusion that is not a clear error of judgment, its action must be affirmed. Citizens to Preserve Overton Park v. Volpe, supra, 401 U.S. at 416-18.

50. In cases arising under NEPA, the meaning of "significantly" in the phrase "significantly affecting the quality of the human environment" presents a mixed question of law and fact. Hanly v. Kleindienst, supra, 471 F.2d at 828.

MIXED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

51. The analysis of wetlands, floodplains, land use impacts, sewage treatment plan design, benefits to

landowners, and sludge handling procedures contained in the administrative record demonstrates that EPA considered the relevant factors in determining whether the project would have a significant impact on the environment.

52. The issuance of the FNSI by EPA was an appropriate exercise of administrative discretion and was not arbitrary and capricious.

53. The EA is in compliance with the requirements of NEPA and 40 C.F.R. §6.507(c), and incorporated within it is an assessment of impacts on floodplains and wetlands in accordance with the requirements of 40 C.F.R. §6.302(a) and (b) and 40 C.F.R. Part 6 Appendix A.

54. EPA complied with the public hearing requirements of NEPA and the Clean Water Act and the applicable

regulations including 40 C.F.R. Part 25; 40 C.F.R. Part 35, Subpart F; 40 C.F.R. §6.400(a), and §6504(a); and 40 C.F.R. §35.917-5.

55. The administrative record reflects that the EPA considered those elements of the project required to be analyzed by 40 C.F.R. §35.925. Although there is no separate document listing specific determinations with respect to every element specified in 40 C.F.R. 35.925, taken as a totality the administrative record reflects that the objectives of 40 C.F.R. §35.925 were accomplished and therefore EPA complied with its terms.

56. In any event, given the fundamental fairness and public consequence test applicable here, Sierra Club v. Hennessy, Dkt. No. 82-6175 (2d Cir. Dec. 6, 1982) (Slip Op. at 11); see also

Weinberger v. Romero-Barcelo, 50
U.S.L.W. 4434, 4435 (April 27, 1982). I
find that the issuance of an injunction
would be wholly inappropriate in this
case. The existing RCSD plant is
overloaded, and expansion is necessary
to protect local water quality and
eliminate harmful characteristics from
the effluent discharged by the County
into the Hudson; the expanded STP will
contain a wide variety of equipment to
control odors inherent in the operation
of the plant, thus benefiting the
residents of Rockland County as a whole,
and those of the Town of Orangetown in
particular; substantially all of the new
RCSD interceptors and the Ramapo
collection system have been routed along
existing rights-of-way in a manner
minimizing wetlands and floodplains
effects; grant conditions prohibit
hook-ups in the Rockland County sewer

system that have the potential for environmental damage; the expansion of the current RCSD plant appears to be the only economically feasible method for addressing the area's needs; and finally, the wetlands and associated areas to be used in the expansion are not substantial.

57. Paragraph omitted.

58. Paragraph omitted.

59. Any testimony of Plaintiff's witnesses, Arnold Fleming and Donald Brenner inconsistent with any findings herein is rejected by the Court.

60. The foregoing constitutes the District Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52.

61. Plaintiff's request for declaratory and injunctive relief is denied and the complaint is dismissed

with costs and disbursements. Submit
judgment on notice.

Dated: New York, New York
January 24, 1983

SO ORDERED:

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TOWN OF ORANGETOWN,

Plaintiff,

-against-

ANNE GORSUCH, Individually
and as Administrator of
the United States Environ-
mental Protection Agency;
RICHARD DEWLING, Individual-
ly and as Regional Admini-
strator of the United States
Environmental Protection
Agency; ROCKLAND COUNTY SEWER
DISTRICT NO. 1; COUNTY OF
ROCKLAND; TOWN OF RAMAPO;
TOWN OF CLARKSTOWN; NEW YORK
STATE DEPARTMENT OF ENVIRON-
MENTAL CONSERVATION; and
ROBERT FLACKE, as Commission-
er of the New York State De-
partment of Environmental
Conservation,

Defendants.

THE COURT'S FINDINGS OF FACT AND
CONCLUSIONS OF LAW

81 Civ. 1147 (RO)

The following Findings of Fact and Conclusions of Law relate to plaintiff Town of Orangetown's fourth claim for relief against the county defendants (Rockland County Sewer District No. 1, the County of Rockland and the Town of Ramapo) in the above-entitled action, and the county defendants' first counterclaim against plaintiff. These claims are the contentions by each party that the sewage treatment plant operated by the opposing party creates a nuisance. The Court in reaching the determination herein has considered the evidence adduced at trial from October 12, 1982 until October 27, 1982. Parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to present evidence bearing on the issue, to argue on the evidence and the law. The Court has

fully considered the complaint, answer, evidence, argument and briefs of counsel. Upon the entire record, the Court makes the following supplemental findings of fact and conclusions of law in addition to those already in the record.

FINDINGS OF FACT*

1. The Rockland County Sewer District No. 1 operates a sewage treatment plant (hereinafter "County Plant") located in Orangetown, New York. The Town of Orangetown also operates a sewage treatment plant (hereinafter "Town Plant"), located in Orangetown,

* The fact that certain findings are excised does not mean they are rejected, but merely that they were not deemed necessary to the resolution of the issues on these claims.

approximately 1800 feet away from the County Plant.

2. Persons who reside or work in Orangetown have experienced sewage odors, emanating from the vicinity of the two sewage treatment plants in the applicable period, 1978 to the present.

3. Sewage treatment plants in general may be expected on occasion to generate unpleasant odors by virtue of the material they process.

4. Several witnesses testified that they were not prepared to identify with certainty which of the two plants was the source of the odors they experienced.

5. Other witnesses who were able to trace odors to the County Plant did not demonstrate a frequency or intensity of odors beyond that to be expected of a sewage treatment plant.

6. The odor complaint file kept by the County Sewer District reveals relatively few odor complaints since 1978. The file also demonstrates that many odor incidents have not been attributed to any definite source; attributable odors have been traced both to the County Plant and the Town Plant.

7. Paragraph omitted.

8. Paragraph omitted.

9. Other odors have been traced specifically to the gate of the Town Plant, and on one occasion the odor was found to be emanating from the primary clarifiers of the Town Plant.

10. Paragraph omitted.

11. Paragraph omitted.

12. An odor study found that the odor control equipment at the Town Plant for the primary clarifier area is not always adequate.

13. The odor study performed by the firm of Hazen and Sawyer in 1975 made recommendations for improvements in odor control at both plants.

14. The County Sewer district demonstrated that, in response to the Hazen and Sawyer recommendations, it has made structural changes in the plant for odor control, and equipment improvements. It has taken steps of its own initiative to improve odor handling, including covering the wetwell.

15. There was no credible evidence of personnel incompetence or failure to employ best efforts to achieve proper operation and maintenance in the County Plant.

16. The failure of a sewage treatment plant to meet its BOD and SS permit requirements is not by itself evidence that odors are being created. Both the

County Plant and the Town Plant have from time to time failed to meet their permit requirements.

17. The evidence in the aggregate shows that both plants have had the potential to generate some unpleasant odors in the past, and both plants have from time to time generated odors in the years since 1978.

CONCLUSIONS OF LAW

1. A conclusion that the operation of the County Plant constituted a nuisance would require a finding that the County Plant has caused an unreasonable and significant interference with the general rights of the public including public health, safety or comfort.

2. In view of the finding that both the Town and County Plants have gener-

ated offensive odors in the area, a conclusion that either plant is a nuisance would require a finding that the odors emanating from that plant alone creates a significant and unreasonable interference with public rights.

3. The evidence presented does not permit a finding of such interference. Consequently, I do not conclude that the Rockland County Sewage Treatment Plant constitutes a nuisance.

4. The evidence presented does not permit a finding of such interference by the Orangetown Sewage Treatment Plant either. I therefore do not conclude that it constitutes a nuisance.

5. Plaintiff's fourth claim for relief and the County Defendants' first counterclaim are hereby dismissed.

Dated: New York, New York
January 25, 1983

SO ORDERED:

Hon. Richard Owen

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TOWN OF ORANGETOWN,

Plaintiff,

-against-

ANNE M. GORSUCH, et al.,

Defendants.

OPINION AND ORDER

81 Civ. 1147 (RO)

OWEN, District Judge

Defendant moves to dismiss plaintiff's complaint for failure to state a claim. Except as to plaintiff's third claim for relief, defendant's motion is denied. As to plaintiff's third claim, defendant's motion is granted.

Plaintiff, the Town of Orangetown ("Orangetown"), is a municipality in Rockland County. A sewage treatment

plant is located there. By this suit for declaratory and injunctive relief, plaintiff seeks to prevent the expansion of that plant.

Plaintiff has named as defendants in this action a number of local, state, and federal parties who play a role in the expansion of the plant. The motion before me today has been brought by only one of those defendants, Robert Flacke, the Commissioner of the New York Department of Environmental Conservation (the "state defendant"). Pursuant to a stipulation endorsed by this court on July 9, 1981, Commissioner Flacke is now before me only in his official capacity.

The sewage treatment plant in Orangetown presently services not only Orangetown itself but also the neighboring Rockland County communities of Ramapo and Clarkstown. Domestic commercial,

and industrial sewage from these three communities flows across the County to the plant in Orangetown where it is treated. Plaintiff contends that the existing plant is already a public nuisance and that the expansion of the plant will only aggravate that nuisance by encouraging further development in the County and thereby increasing the burden on the Orangetown plant and its environs.

Plaintiff's attack challenges the funding of the proposed expansion. Construction of sewage treatment facilities is a costly undertaking. Plaintiff estimates that the total cost of the Orangetown expansion will reach approximately \$120 million with funding to be provided from federal, state, and local revenues. Combined, the federal

and local contributions to the plant will total \$100 million.

The Environmental Protection Agency will administer the federal contribution to the Orangetown plant. Where the EPA administers a program such as the Orangetown expansion, it provides money in three stages. At Stage One a grant is provided for facilities planning; Stage Two funds the preparation of construction drawings and specifications; construction funds are provided by a Stage Three grant. Plaintiff seeks to cut off the expansion of the Orangetown plant at Stage Two.

The essence of this lawsuit, thus, is the allegation that defendants cannot move forward with the expansion of the plant because defendants have not complied with the requisite federal and state environmental requirements and

because the plant constitutes a continuing public nuisance.

Plaintiff asserts four claims for relief. First, plaintiff alleges that defendant violated the National Environmental Protection Act, 42 U.S.C. §4331, et seq.; second plaintiff alleges a violation of the Clean Water Act, 33 U.S.C. §1281, et seq.; plaintiff's third claim alleges a violation of the New York State Environmental Quality Review Act, ECL §8-0101, et seq.; plaintiff's final claim alleges that the proposed expansion of the plant will constitute a public nuisance.

Before me is the state defendant's motion to dismiss plaintiff's suit as it applies to him in his official capacity. Flacke contends that the Eleventh Amendment bars the prosecution of all of plaintiff's claims in federal court and,

moreover, that plaintiff is prohibited from bringing any of its claims as parens patriae for its residence. As to plaintiff's individual claims for relief, the state defendant contends: first, that plaintiff's first and second claims must be dismissed pursuant to Rule 12(b)(6); second, that plaintiff's third claim for relief must be dismissed because it was filed beyond the applicable four-month limitations period set forth in Section 217 of the New York Civil Procedure Law and Rules; and, third, that plaintiff's fourth claim for relief must be dismissed because the alleged public nuisance has been caused not by the proposed expansion but by the past operation of the existing plant. I consider each of state defendant's arguments seriatim.

A. The Eleventh Amendment does not bar equitable relief as against the state defendant.

In Flacke's motion papers as first filed with this court, he contended that the Eleventh Amendment barred all of the remedies sought by plaintiff, e.g., money damages, and injunctive and declaratory relief. Since that date, however, the parties have agreed to drop the fifth claim alleging money damages, thus limiting plaintiff's claims against the state defendant to those alleging equitable relief. Flacke nevertheless continues to contend that the Eleventh Amendment bars relief.

The Eleventh Amendment however, does not bar a federal court from granting prospective equitable relief as against a state official. See Edelman v. Jordan, 415 U.S. 651 (1974). Moreover,

"[i]t has long been familiar doctrine . . . that the Eleventh Amendment does not prevent a federal court from directing a State official to bring his conduct into conformity with federal law." Byram River v. Village of Port Chester, 394 F. Supp. 618, 628 (S.D.N.Y. 1975).¹/

- B. While Plaintiff may not assert any claims as parens patriae, it may still maintain this action in order to vindicate its own proprietary rights.

As a second ground for dismissing this action as to him entirely, Flacke lists plaintiff's inability to bring suit as parens patriae. While I agree

¹ State defendant has mistakenly relied on the broad principle as repeated in the Byram River case that, "In an action against a State the Eleventh Amendment acts as an absolute bar to suit unless the State has waived its immunity." Byram River, supra at 624. While that amendment is undeniably true it makes no comment about suits brought against state officials. See Ex parte Young, 209 U.S. 123 (1908).

that plaintiff may not maintain this action as parens patriae it may do so to protect its own proprietary rights.

Under the common law concept of parens patriae, the federal and state governments have traditionally been vested with the power and duty to bring suits in order to vindicate interests of their citizens. Conversely, "political subdivisions such as cities and countries, whose power is derivative and not sovereign, cannot sue as parens patriae" In re Multi-district Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 131 (9th Cir. 1973). State defendant is therefore correct that plaintiff cannot maintain this action as parens patriae, but plaintiff is not thereby totally disabled from maintaining this action. Paragraph Three of the complaint states that "Orangetown brings this suit acting

on its own behalf and as parens patriae for its residents." Thus, even assuming that plaintiff cannot bring this action on behalf of its residents, plaintiff's claims nevertheless survive because political subdivisions such as cities and counties may "sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants."

C. Plaintiff's first and second claims state claims upon which relief can be granted.

Defendant next argues that plaintiff's first and second claims must be dismissed because the relief sought can be provided only by the federal defendants. See Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971).

On the contrary, "[i]t is well settled that non-federal parties may be

enjoined, pending completion of an EIS, where those entities have entered into a partnership or joint venture with the Federal Government, and are this recipients of federal funding." Biderman v. Morton, 497 F.2d 1141, 1147 (2d Cir. 1974). The state defendant is such a partner of the federal defendants in the sewage treatment plant; it is a recipient of federal funds for the completion of the plant. Adequate relief for plaintiff, if it is to be granted, necessarily must reach all members of the Orangetown venture. Therefore, I conclude that plaintiff may maintain its first and second claims for relief against state defendant.

D. Plaintiff's state law claims are barred by the statute of limitations.

State defendant next contends that plaintiff's third claims for relief

pursuant to SEQRA should be dismissed because under the applicable four-month limitations period plaintiff's claim is time-barred. I concur both with defendant's choice of a limitations period and with the conclusion that plaintiff has failed to timely assert this claim.

Plaintiff's third claim for relief raises a state law issue. Where stated-created rights are being contested, the limitations period is governed by state statute. See, e.g., Guaranty Trust Co. v. York, 326 U.S. 99 (1945). In this instance, the appropriate statute is Section 217 of the New York Civil Procedure Law and Rules which allows that proceedings against a state officer must be commenced "within four months after the determination to be reviewed becomes final and binding...."

On September 11 and 12, 1980, the state defendant submitted and certified the application attendant to the Orange-town plant to the Grants Administration Branch of the EPA. That activity concluded the state defendant's obligations pursuant to SEQRA, and the commencement of the action in February, 1981, was beyond the statute of limitations. The claim is therefore barred. Reisel, Inc. v. Exxon Corp., 349 N.Y.S.2d 14, 20 (2d Dept. 1973), aff'd 36 N.Y.2d 888 (1975).

Finally, defendant contends that plaintiff's fourth claim for relief must be dismissed because the challenged conduct cannot be attributed to the state defendant and because a town "may not bring an action to restrain a public nuisance which causes damage to the private property of its citizens." New

York Trap Rock v. Town of Clarkstown, 299 N.Y. 77, 83, (Ct. App. 1949) (emphasis in original).

While plaintiff's fourth claim for relief, as it applies to the state defendant, is not a model of drafting expertise, plaintiff does allege that "The operation of the County plant constitutes and will continue to constitute constitute, a public nuisance." Complaint ¶94. Specifically, plaintiff alleges that the operation of the plant is causing both injury to the health of its citizens, (¶91), and diminution of property values. (¶92).

State defendant correctly relies on New York Trap Rock, supra, as grounds for dismissal of the fourth claim to the extent it asserts a diminution of private property values as distinguished from a diminution of the value of its

own properties. New York Trap Rock
clearly acknowledges, however, that a
municipality's right to sue does extend
to an action grounded upon public
nuisance law asserting injury to the
health of its citizens.

An order may be submitted effec-
tuating all the foregoing.

United States District Judge

Dated: July 26, 1982
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TOWN OF ORANGETOWN,

Plaintiff,

-against-

ANNE GORSUCH, Individually
and as Administrator of
the United States Environ-
mental Protection Agency;
RICHARD DEWLING, Individual-
ly and as Regional Admini-
strator of the United States
Environmental Protection
Agency; ROCKLAND COUNTY SEWER
DISTRICT NO. 1; COUNTY OF
ROCKLAND; TOWN OF RAMAPO;
TOWN OF CLARKSTOWN; NEW YORK
STATE DEPARTMENT OF ENVIRON-
MENTAL CONSERVATION; and
ROBERT FLACKE, as Commission-
er of the New York State De-
partment of Environmental
Conservation,

Defendants.

ORDER

81 Civ. 1147 (RO)

Defendants New York State Department
of Environmental Conservation ("DEC")

and Robert Flacke, individually and as Commissioner of the New York State Department of Environmental Conservation, having moved this Court for an order dismissing the complaint as against them, pursuant to Rules 12(b)(1), (3) and (6) of the Federal Rules of Civil Procedure; and defendants New York State Department of Environmental Conservation and Robert Flacke having entered into a stipulation with plaintiff Town of Orangetown dated July 8, 1981, and endorsed by this Court on July 9, 1981, which provided, among other things, that:

1. Plaintiff will voluntarily discontinue the fifth claim asserted in the complaint as against the state defendants, and will voluntarily discontinue the first, second, third and fourth claims asserted in the complaint as against both DEC and Robert Flacke, Individually; and plaintiff will, at an appropriate time, formally amend or supplement the Complaint to implement such discontinuances.

2. In light of the discontinuances described in Paragraph 1 above, the state defendants have agreed to withdraw so much of their motion as (i) relates to the fifth claim for relief; and (ii) relates to the first, second, third and fourth claims for relief against DEC or Robert Flacke, Individually;

3. The motion before the Court will be limited to the sufficiency of the claims asserted in the first four claims for relief against defendant Robert Flacke, as Commissioner of the DEC;

and upon reading the summons and complaint, dated February 2, 1981; the notice of notice to dismiss, dated April 15, 1981; the memorandum in support of the motion to dismiss, dated April 15, 1981; plaintiff's memorandum of law in opposition to motion to dismiss; and the stipulation dated July 8, 1981; and the Court having heard argument of counsel for the respective parties on July 17, 1981; and the Court after due deliberation having filed its opinion and order dated July 26, 1982 which granted the

motion, as limited by the stipulation, in various respects; it is

ORDERED, that plaintiffs third claim for relief be and the same is hereby dismissed; and it is further

ORDERED, that plaintiff's claims for relief as parens patriae be and the same are hereby dismissed; and it is further

ORDERED, that plaintiffs fourth claim for relief is dismissed to the extent that it seeks to recover for diminution of the value of properties not owned by plaintiff; and it is further

ORDERED, that the motion of the New York State Department of Environmental Conservation and Robert Flacke is in all other respects denied; and it is further

ORDERED, that plaintiff Town of Orangetown serve an amended complaint in accordance with the stipulation dated July 8, 1981 within five (5) days of

entry of this order, and that defendants serve answers within ten (10) days of receipt of said amended complaint.

Dated: New York, New York
September 7, 1982

United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TOWN OF ORANGETOWN,

Plaintiff,

-against-

ANNE GORSUCH, Individually
and as Administrator of
the United States Environ-
mental Protection Agency;
RICHARD DEWLING, Individual-
ly and as Regional Admini-
strator of the United States
Environmental Protection
Agency; ROCKLAND COUNTY SEWER
DISTRICT NO. 1; COUNTY OF
ROCKLAND; TOWN OF RAMAPO;
TOWN OF CLARKSTOWN; NEW YORK
STATE DEPARTMENT OF ENVIRON-
MENTAL CONSERVATION; and
ROBERT FLACKE, as Commission-
er of the New York State De-
partment of Environmental
Conservation,

Defendants.

81 Civ. 1147 (RO)

Except to the limited extent there is
consent, the motion is denied.

SO ORDERED

1/24/83

HON. RICHARD C. OWEN

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TOWN OF ORANGETOWN,

Plaintiff,

-against-

ANNE GORSUCH, Individually
and as Administrator of
the United States Environ-
mental Protection Agency;
RICHARD DEWLING, Individual-
ly and as Regional Admini-
strator of the United States
Environmental Protection
Agency; ROCKLAND COUNTY SEWER
DISTRICT NO. 1; COUNTY OF
ROCKLAND; TOWN OF RAMAPO;
TOWN OF CLARKSTOWN; NEW YORK
STATE DEPARTMENT OF ENVIRON-
MENTAL CONSERVATION; and
ROBERT FLACKE, as Commission-
er of the New York State De-
partment of Environmental
Conservation,

Defendants.

81 Civ. 1147 (RO)

JUDGMENT

This action came on for trial before
the Court without a jury, Honorable

Richard Owen, District Judge, presiding on October 12, 1982 until October 27, 1982, and was argued by counsel.

On October 13, 1982, during the course of the trial, the court dismissed the fourth and fifth claims of plaintiff as against defendant Town of Clarkstown.

On October 21, 1982, at the conclusion of plaintiff's direct case, the court dismissed plaintiff's third claim, relating to the State Environmental Quality Review Act as against all defendants; dismissed plaintiff's fourth claim, for injunctive relief due to nuisance, as against the federal and state defendants; and dismissed plaintiff's fifth claim, for monetary damages due to nuisance, as against all defendants.

On October 26, 1982, at the conclusion of defendants' case, the court

dismissed the second counterclaim of defendants Rockland County Sewer District No. 1, County of Rockland and Town of Ramapo, with regard to monetary damages for nuisance, as against plaintiff. At that time, defendants Rockland County Sewer District No. 1, County of Rockland and Town of Ramapo, withdrew their third and fourth counterclaims relating to industrial pretreatment requirements, as against plaintiff.

On October 27, 1982, at the close of trial, upon consideration of argument by counsel, the court rendered a decision from the bench dismissing plaintiff's fourth claim relating to nuisance, as against all defendants, and dismissing the first counterclaim of defendants Rockland County Sewer District No. 1, County of Rockland, and the Town of

Ramapo, relating to nuisance, against plaintiff.

Upon consideration of memoranda of law submitted by counsel, the court has filed findings of fact, conclusions of law and mixed findings of fact and conclusions of law, with regard to plaintiff's remaining claims, dated January 24, 1983.

The court has filed supplemental findings of fact and conclusions of law with regard to plaintiff's fourth claim and defendants' first counterclaim, dated January 25, 1983. It is therefore hereby

ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff's first claim for relief, relating to the National Environmental Policy Act is dismissed on the merits as against defendants Anne Gorsuch, individually and as Administ-

rator of the United States Environmental Protection Agency ("Gorsuch"); Richard Dewling, individually and as Regional Administrator of the United States Environmental Protection Agency ("Dewling"); Rockland County Sewer District No. 1; County of Rockland; Town of Ramapo; and Robert Flacke, as Commissioner of the New York State Department of Environmental Conservation ("Flacke").

2. Plaintiff's second claim for relief, relating to the Clean Water Act, is hereby dismissed on the merits as against defendants Gorsuch, Dewling, Rockland County Sewer District No. 1, County of Rockland, Town of Ramapo and Flacke.

3. Plaintiff's third claim for relief relating to the State Environmental Quality Review Act is hereby

dismissed on the merits as against defendants Flacke, Rockland County Sewer District No. 1, County of Rockland and Town of Ramapo.

4. Plaintiff's fourth claim for relief, relating to injunctive relief for nuisance, is hereby dismissed on the merits as against defendants Gorsuch, Dewling, Rockland County Sewer District No. 1, County of Rockland, Town of Ramapo, Town of Clarkstown and Flacke.

5. Plaintiff's fifth claim for relief, relating to monetary relief for nuisance, is hereby dismissed on the merits as against defendants Gorsuch, Dewling, Rockland County Sewer District No. 1, County of Rockland, Town of Ramapo and Town of Clarkstown.

6. Plaintiff's sixth claim for relief, related to Step III, Phase I grants for the project, is hereby

dismissed on the merits as against defendants Gorsuch, Dewling, Rockland County Sewer District No. 1, County of Rockland, the New York State Department of Environmental Conservation and Flacke.

7. The first counterclaim of defendants Rockland County Sewer District No. 1, County of Rockland and the Town of Ramapo, relating to injunctive relief for nuisance, is hereby dismissed on the merits as against plaintiff.

8. The second counterclaim of defendants Rockland County Sewer District No. 1, County of Rockland and the Town of Ramapo, relating to monetary relief for nuisance, is hereby dismissed on the merits as against plaintiff.

9. The complaint is hereby dismissed in its entirety, with costs and disbursements to defendants, and all

counterclaims are dismissed without
costs.

Dated: New York, New York
February 3, 1983

Richard Owen
U.S.D.J.

JUDGMENT ENTERED: 2/4/83

Clerk

UNITED STATES ENVIRONMENTAL PRO-
TECTION AGENCY
Region II
26 Federal Plaza
New York, New York 10278

August 29, 1980

To All Interested Govern-
ment Agencies and Public
Groups:

In accordance with the procedures for
the preparation of environmental impact
statements, an environmental review has
been performed on the proposed agency
action below:

Project Name: Rockland County Sewer
District No. 1 (RCSD No.
1) sewage treatment plant
expansion, sludge hand-
ling facilities and in-
terceptor sewers.

Town of Ramapo collection
sewers.

Project Numbers: C-36-744-03 (Step 2 Grant)
RCSD No. 1

C-36-1253-01 (Step 2
Grant) Town of Ramapo

Purpose of Project: The purpose of this pro-
ject is four fold: to
replace failing indivi-
dual septic systems in

Ramapo with collection sewers; to provide interceptor sewers to convey sewage from the Towns of Ramapo and Clarkstown to the RCSD No. 1 STP; to expand the overloaded RCSD No. 1 STP to treat existing and future flows from the proposed service area; to provide facilities to process sludge from the RCSD No. 1 STP.

Project RCSD No. 1
 Originators: Town of Ramapo

Project
 Location: Towns of Ramapo, Clarkstown and Orangetown, New York

Project
 Description: Preparation of plans and specifications for construction of collection sewers, pump stations, STP expansion and sludge handling facilities as described in detail in Section IV of the attached environmental assessment.

Proposed
 Eligible
 Project
 Costs: \$ 3,758,380 -
 RCSD No. 1
 \$ 674,000 -
 Town of Ramapo

EPA Grant \$ 2,858,630 -
(75%): RCSD No. 1

 \$ 506,000 -
 Town of Ramapo

Our environmental review of this project indicates that no significant environmental impacts will result from the proposed action. Consequently, we have made a preliminary decision not to prepare an environmental impact statement (EIS) on the project.

This decision is based on a careful review of the engineering report, the environmental information document, and other supporting data. All of these documents, along with the environmental assessment, are on file at the EPA regional office, where they are available for public scrutiny upon request. A copy of the environmental assessment is enclosed for your review.

Both the State of New York and the EPA recognize that this project is located in an Air Quality Control Region (AQCR). This fact has been accounted for in our review.

Comments supporting or disagreeing with this decision may be submitted to the EPA for consideration. All comments must be received within thirty (30) calendar days of the date of this finding of no significant impacts (FNSI). Please address your comments to the Chief, New York and Virgin Islands Section, Environmental Impacts Branch, Room 400. After evaluating any comments

received on the project, the EPA will make a final decision. However, no administrative action will be taken on the project for at least thirty (30) calendar days after the date of this FNSI.

Sincerely yours,

Charles S. Warren
Regional Administrator

Enclosure

CLEAN WATER ACT

§1283. Plans, specifications, estimates, and payments

- (a) Submission; contractual nature of approval by Administrator; combined grants

Each applicant for a grant shall submit to the Administrator for his approval, plans, specifications, and estimates for each proposed project for the construction of treatment works for which a grant is applied for under section 1281(g)(1) of this title from funds allotted to the State under section 1285 of this title and which otherwise meets the requirements of this chapter. The Administrator shall act upon such plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such plans, specifications, and estimates shall be deemed a contractual obligation of the United

States for the payment of its proportional contribution to such project.

§1284. Limitations and conditions

(a) Before approving grants for any project or any treatment works under section 1281(g)(1) of this title the Administrator shall determine -

(1) that such works are included in any applicable areawide waste treatment management plan developed under section 1288 of this title;

(2) that such works are in conformity with any applicable State plan under section 1313(e) of this title;

(3) that such works have been certified by the appropriate State water pollution control agency as entitled to

priority over such other works in the State in accordance with any applicable State plan under section 1313(e) of this title, except that any priority list developed pursuant to section 1313(e) (3) (H) of this title may be modified by such State in accordance with regulations promulgated by the Administrator to give higher priority for grants for the Federal share of the cost of preparing construction drawings and specifications for any treatment works utilizing processes and techniques meeting the guidelines promulgated under section 1314(d) (3) of this title and for grants for the combined Federal share of the cost of preparing construction drawings and specifications and the building and erection of any treatment works meeting the requirements of the next to the last sentence of section 1283(a) of this title which utilizes

processes and techniques meeting the guidelines promulgated under section 1314(d)(3) of this title;

(4) that the applicant proposing to construct such works agrees to pay the non-Federal costs of such works and has made adequate provisions satisfactory to the Administrator for assuring proper and efficient operation, including the employment of trained management and operations personnel, and the maintenance of such works in accordance with a plan of operation approved by the State water pollution control agency or, as appropriate, the interstate agency, after construction thereof;

(5) that the size and capacity of such works relate directly to the needs to be served by such works, including sufficient reserve capacity. The amount

of reserve capacity provided shall be approved by the Administrator on the basis of a comparison of the cost of constructing such reserves as a part of the works to be funded and the anticipated cost of providing expanded capacity at a date when such capacity will be required, after taking into account, in accordance with regulations promulgated by the Administrator, efforts to reduce total flow of sewage and unnecessary water consumption. The amount of reserve capacity eligible for a grant under this subchapter shall be determined by the Administrator taking into account the projected population and associated commercial and industrial establishments within the jurisdiction of the applicant to be served by such treatment works as identified in an approved facilities plan, an areawide plan under section 1288 of this title,

or an applicable municipal master plan of development. For the purpose of this paragraph, section 1288 of this title, and any such plan, projected population shall be determined on the basis of the latest information available from the United States Department of Commerce or from the States as the Administrator, by regulation, determines appropriate. Beginning October 1, 1984, no grant shall be made under this subchapter to construct that portion of any treatment works providing reserve capacity in excess of existing needs (including existing needs of residential, commercial, industrial, and other users) on the date of approval of a grant for the erection, building, acquisition, alteration, remodeling, improvement, or extension of a project for secondary treatment or more stringent treatment or new interceptors and appurtenances,

except that in no event shall reserve capacity of a facility and its related interceptors to which this subsection applies be in excess of existing needs on October 1, 1990. In any case in which an applicant proposes to provide reserve capacity greater than that eligible for Federal financial assistance under this title, the incremental costs of the additional reserve capacity shall be paid by the applicant;

(6) that no specification for bids in connection with such works shall be written in such a manner as to contain proprietary, exclusionary, or discriminatory requirements other than those based upon performance, unless such requirements are necessary to test or demonstrate a specific thing or to provide for necessary interchangeability

of parts and equipment. When in the judgment of the grantee, it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement, and in doing so the grantee need not establish the existence of any source other than the brand or source so named.

(b)(1) Notwithstanding any other provision of this subchapter, the Administrator shall not approve any grant for any treatment works under section 1281(g)(1) of this title after March 1, 1973, unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the

applicant's jurisdiction, as determined by the Administrator, will pay its proportionate share (except as otherwise provided in this paragraph) of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant; and (B) has legal, institutional, managerial, and financial capability to insure adequate construction, operation, and maintenance of treatment works throughout the applicant's jurisdiction, as determined by the Administrator. In any case where an applicant which, as of December 27, 1977, uses a system of dedicated ad valorem taxes and the Administrator determines that the applicant has a system of charges which results in the distribution of operation and maintenance costs for treatment works within the applicant's jurisdiction, to each user class, in proportion

to the contribution to the total cost of operation and maintenance of such works by each user class (taking into account total waste water loading of such works, the constituent elements of the wastes, and other appropriate factors), and such applicant is otherwise in compliance with clause (A) of this paragraph with respect to each industrial user, then such dedicated ad valorem tax system shall be deemed to be the user charge system meeting the requirements of clause (A) of this paragraph for the residential user class and such small non-residential user classes as defined by the Administrator. In defining small non-residential users, the Administrator shall consider the volume of wastes discharged into the treatment works by such users and the constituent elements of such wastes as well as such other factors as he deems appropriate.

EPA REGULATIONS

§35.925 Limitations on award.

Before awarding initial grant assistance for any project for a treatment works through a grant or grant amendment, the Regional Administrator shall determine that all of the applicable requirements of §35.920-3 have been met. He shall also determine the following:

§35.925-1 Facilities planning.

That, if the award is for step 2, step 3, or step 2 + 3 grant assistance, the facilities planning requirements in §35.917 et seq. have been met.

§35.925-2 Water quality management plans and agencies.

That the project is consistent with any applicable water quality management (WQM) plan approved under section 208 or

section 303(e) of the Act; and that the applicant is the wastewater management agency designated in any WQM plan certified by the Governor and approved by the Regional Administrator.

§35.925-3 Priority determination.

That such works are entitled to priority in accordance with §35.915, and that the award of grant assistance for the proposed project will not jeopardize the funding of any treatment works of higher priority.

§35.925-4 State allocation.

That the award of grant assistance for a particular project will not cause the total of all grant assistance which applicants within a State received, including grant increases, to exceed the total of all allotments and reallotments available to the State under §35.910.

§35.925-5 Funding and other capabilities.

That the applicant has:

(a) Agreed to pay the non-Federal project costs, and

(b) The legal, institutional, managerial, and financial capability to insure adequate construction, operation, and maintenance of the treatment works throughout the applicant's jurisdiction.

(Also see §30.340-3 of this sub-chapter.)

§35.925-6 Permits.

That the applicant has, or has applied for, the permit or permits as required by the national pollutant discharge elimination system (NPDES) with respect to existing discharges affected by the proposed project.

§35.925-7 Design.

That the treatment works design will be (in the case of projects involving step 2) or has been (in the case of projects for step 3) based upon:

(a) Appendix A to this subpart, so that the design, size, and capacity of such works are cost-effective and relate directly to the needs they serve, including adequate reserve capacity;

(b) Subject to the limitations set forth in §35.930-4, achievement of applicable effluent limitations established under the Act, or BPWTT (see §35.917-1(d)(5)), including consideration, as appropriate, for the application of technology which will provide for the reclaiming or recycling of water or otherwise eliminate the discharge of pollutants;

(c) The sewer system evaluation and rehabilitation requirements of §35.927;

and

(d) The value engineering requirements of §35.926 (b) and (c).

§35.925-8 Environmental review.

(a) That, if the award is for step 2, step 3, or step 2+3, the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) applicable to the project step have been met. The grantee or grant applicant must prepare an adequate assessment of expected environmental impacts, consistent with the requirements of Part 6 of this chapter, as part of facilities planning, in accordance with §35.917-1(d)(7). The Regional Administrator must insure that an environmental impact statement or a negative declaration is prepared in accordance with Part 6 of this chapter (particularly §§6.108, 6.200, 6.212, and

6.504) in conjunction with EPA review of a facility plan and issued before any award of step 2 or step 3 grant assistance.

(b) The Regional Administrator may not award step 2 or step 3 grant assistance if the grantee has not made, or agreed to make, pertinent changes in the project, in accordance with determinations made in a negative declaration or environmental impact statement. He may condition a grant to ensure that the grantee will comply, or seek to obtain compliance, with such environmental review determinations. The conditions may address secondary impacts to the extent deemed appropriate by the Regional Administrator

§35.925-9 Civil rights.

That if the award of grant assistance

is for a project involving step 2 or step 3, the applicable requirements of the Civil Rights Act of 1964 and Part 7 of this chapter have been met.

§35.925-10 Operation and maintenance program.

If the award of grant assistance is for a step 3 project, that the applicant has made satisfactory provision to assure proper and efficient operation and maintenance of the treatment works (including the sewer system), in accordance with §35.935-12, and that the State will have an effective operation and maintenance monitoring program to assure that treatment works assisted under this subpart comply with applicable permit and grant conditions.

\$35.925-11 User charges and industrial cost recovery.

That, in the case of grant assistance for a project involving step 2 or step 3, the grantee has complied or will comply with the requirements for user charge and industrial cost recovery systems. (See §§35.928 et seq., 35.929 et seq., 35.935-13, and 35.935-15.)

(a) Grants awarded before July 1, 1979. Grantees must submit a schedule of implementation to show that their user charge and industrial cost recovery systems will be approved in accordance with the requirements of §§35.935 and 35.935-15.

(b) Grants awarded after June 30, 1979. The grantee's user charge and industrial cost recovery systems must be approved before the award of step 3 grant assistance.

(c) Letters of intent. In the case of any grant assistance for a project involving step 2 or step 3, the applicant must have received signed letters of intent from each significant industrial user stating that it will pay that portion of the grant amount allocable to the treatment of its wastes. Each such letter shall also include a statement of the industrial user's intended period of use of the treatment works. A significant industrial user is one that will contribute greater than 10 percent of the design flow or design pollutant loading of the treatment works. In addition, the applicant must agree to require all industrial users to pay that portion of the grant amount allocable to the treatment of wastes from such users.

NOTE: For a class deviation document affecting §35.925-11, see 45 FR 81567, Dec. 11, 1980.

§35.925-12 Property.

That the applicant has demonstrated to the satisfaction of the Regional Administrator that it has met or will met the property requirements of §35.935-3.

§35.925-13 Sewage collection system.

That, if the project involves sewage collection system work, such work (a) is for the replacement or major rehabilitation of an existing sewer system under §35.927-3(a) and is necessary to the total integrity and performance of the waste treatment works serving the community, or (b) is for a new sewer system in a community in

existence on October 18, 1972, which has sufficient existing or planned capacity to adequately treat such collected sewage. Replacement or major rehabilitation of an existing sewer system may be approved only if cost-effective; the result must be a sewer system design capacity equivalent to that of the existing system plus a reasonable amount for future growth. For purposes of this section, a community would include any area with substantial human habitation on October 18, 1972, as determined by an evaluation of each tract (city blocks or parcels of 5 acres or less where city blocks do not exist). No award may be made for a new sewer system in a community in existence on October 18, 1972, unless the Regional Administrator further determines that:

- (a) The bulk (generally two-thirds)

of the expected flow (flow from existing plus projected future habitations) from the collection system will be for waste waters originating from the community (habitations) in existence on October 18, 1972;

(b) The collection system is cost-effective;

(c) The population density of the area to be served has been considered in determining the cost-effectiveness of the proposed project:

(d) The collection system conforms with any approved WQM plan, other environmental laws in accordance with §35.925-14, Executive Orders on Wetlands and Floodplains and Agency policy on wetlands and agricultural lands; and

(e) The system would not provide capacity for new habitations or other

establishments to be located on environmentally sensitive land such as wetlands, floodplains or prime agricultural lands. Appropriate and effective grant conditions, (e.g., restricting sewer hook-up) should be used where necessary to protect these resources from new development.

\$35.925-14 Compliance with
environmental laws.

That the treatment works will comply with all pertinent requirements of applicable Federal, State and local environmental laws and regulations. (See §30.101 and Subpart C of Part 30 of this chapter and the Clean Air Act.)

\$35.925-15 Treatment of industrial
wastes.

That the allowable project costs do not include (a) costs of interceptor or

collector lines constructed exclusively, or almost exclusively, to serve industrial sources or (b) costs allocable to the treatment for control or removal of pollutants in wastewater introduced into the treatment works by industrial sources, unless the applicant is required to remove such pollutants introduced from nonindustrial sources. The project must be included in a complete waste treatment system, a principal purpose of which project (as defined by the Regional Administrator; see §§35.903 (d) and 35.905) and system is the treatment of domestic wastes of the entire community, area, region or the district concerned. See the pretreatment regulations in Part 403 of this chapter and §35.907.

[44 FR 39340, July 5, 1979]

§35.925-16 Federal activities.

That the allowable step 2 or step 3 project costs do not include the proportional costs allocable to the treatment of wastes from major activities of the Federal Government. A "major activity" includes any Federal facility which contributes either (a) 250,000 gallons or more per day or (b) 5 percent or more of the total design flow of waste treatment works, whichever is less.

§35.925-17 Retained amounts for reconstruction and expansion.

That the allowable project costs have been reduced by an amount equal to the unexpended balance of the amounts the applicant retains for future reconstruction and expansion under §35.928-2(a)(2)(ii), together with interest earned.

§35.925-18 Limitation upon project costs incurred prior to award.

That project construction has not been initiated before the approved date of initiation of construction (as defined in §35.905), unless otherwise provided in this section.

(a) Step 1 or Step 2: No grant assistance is authorized for step 1 or step 2 project work performed before award of a step 1 or step 2 grant. However, payment is authorized, in conjunction with the first award of grant assistance, for all preaward allowable project costs in the following cases:

(1) Step 1 work begun after the date of approval by the Regional Administrator of a plan of study, if the State requests and the Regional Administrator has reserved funds for the step 1 grant. However, the step 1 grant must be

applied for and awarded within the allotment period of the reserved funds.

(2) Step 1 or step 2 work begun after October 31, 1974, but before June 30, 1975, in accordance with an approved plan of study or an approved facilities plan, as appropriate, but only if a grant is awarded before April 1, 1981.

(3) Step 1 or step 2 work begun before November 1, 1974, but only if a grant is awarded before April 1, 1980.

(b) Step 3: Except as otherwise provided in this paragraph, no grant assistance for a step 3 project may be awarded unless the award precedes initiation of the step 3 construction. Preliminary step 3 work, such as advance acquisition of major equipment items requiring long lead times, acquiring of eligible land or of an option for the purchase of eligible land, or advance

construction of minor portions of treatment works, including associated engineering costs, in emergencies or instances where delay could result in significant cost increases, may be approved by the Regional Administrator after completion of environmental review, but only if (1) the applicant submits a written and adequately substantiated request for approval and (2) written approval by the Regional Administrator is obtained before initiation of the advance acquisition or advance construction. (In the case of authorization for acquisition of eligible land, the applicant must submit a plat which shows the legal description of the property to be acquired, a preliminary layout of the distribution and drainage systems, and an explanation of the

intended method of acquiring the property.)

(c) The approval of a plan of study, a facilities plan, or advance acquisition of equipment or advance construction will not constitute a commitment for approval of grant assistance for a subsequent treatment works project, but will allow payment for the previously approved costs as allowable project costs upon subsequent award of grant assistance, if requested before grant award (see §35.945(a)). In instances where such approval is obtained, the applicant proceeds at its own risk, since payment for such costs cannot be made unless grant assistance for the project is awarded.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 39340, July 5, 1979]

§35.925-19 [Reserved]

§35.925-20 Procurement.

That the applicant has complied or will comply with the applicable provisions of §§35.935 through 35.939 with respect to procurement actions taken before the award of step 1, 2 or 3 grant assistance, such as submission of the information required under §35.937-6.

§35.925-21 Storm sewers.

That, under section 211(c) of the Act, the allowable project costs do not include costs of treatment works for control of pollutant discharges from a separate storm sewer system (as defined in §35.905).

NATIONAL ENVIRONMENTAL POLICY ACT

\$4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

. . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented....

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No. 83-857

Office - Supreme Court, U.S.

FILED

FEB 22 1984

ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

TOWN OF ORANGETOWN, PETITIONER

v.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Assistant Attorney General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

THOMAS D. WARREN
Assistant United States Attorney
New York, N. Y. 10007

QUESTIONS PRESENTED

1. Whether, in awarding sewage treatment grants to the Rockland County Sewer District No. 1, the Environmental Protection Agency failed to make determinations required by agency regulations, 40 C.F.R. 35.925.

2. Whether, in light of the opposition of petitioner and others to the project underwritten by the federal sewage treatment grants, the agency erred in determining that preparation of a full-scale environmental impact statement was not required.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

<i>Camp v. Pitts</i> , 411 U.S. 138	7
<i>Citizens to Preserve Overton Park v. Volpe</i> , 401 U.S. 402	6, 7
<i>Dunlop v. Bachowski</i> , 421 U.S. 560	6
<i>Environmental Defense Fund, Inc. v. Costle</i> , 439 F. Supp. 980	5
<i>Metropolitan Edison Co. v. PANE</i> , No. 81-2399 (Apr. 19, 1983)	8

Statutes and regulations:

National Environmental Policy Act, 42 U.S.C. 4332(2)(C)	2, 8
33 U.S.C. (& Supp. V) 1281 <i>et seq.</i>	2
40 C.F.R. :	
Pt. 35	5
Section 35.925	3, 4, 6, 7
Section 35.925-7	3, 5

IV

	Page
Statutes and regulations—Continued:	
Section 35.925-8	3, 6
Section 35.925-13	3, 6
Pt. 133	5
Pt. 1508:	
Section 1508.27(b)(4)	8

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-857

TOWN OF ORANGETOWN, PETITIONER

v.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 718 F.2d 29. The district court's findings of fact and conclusions of law (Pet. App. A29-A47) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1983. The petition for a writ of certiorari was filed on November 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. By this action, filed in the United States District Court for the Southern District of New York, petitioner challenges the award of federal sewage treatment grants to the

Rockland County Sewer District No. 1 (RCSD) and the Town of Ramapo. The challenged grants are intended to underwrite the expansion and improvement of the area's sewage collection system and sewage treatment plant. These projects were initiated because RCSD's existing plant is too small to process the sewage generated within the District and urgently needs modernization, and because failing septic systems and inadequate sewer lines pose a serious threat to ground water supplies in Rockland County (Pet. App. A4-A5).

RCSD and the Town of Ramapo first applied to EPA for funding to begin planning sewage collection and treatment improvements in 1976. A grant for planning — the first stage of the three step grant sequence under the Clean Water Act construction grants program, 33 U.S.C. (& Supp. V) 1281 *et seq.* — was issued in that year. Over the next four years, RCSD prepared a voluminous "Facilities Plan" for the projected sewer improvements, consulting frequently with EPA and the New York Department of Environment Conservation, and modifying the proposal from time to time in light of those consultations, comments from interested members of the public, and the results of its own studies. Based upon the resulting Facilities Plan, in 1980 RCSD submitted a further application for a "Step 2" grant to fund design of the proposed improvements. The state agency certified its approval of the application to EPA, and on August 29, 1980, the EPA released a finding that the project would not have a significant environmental impact such as would necessitate preparation of a formal environmental impact statement (EIS) under the National Environmental Policy Act, 42 U.S.C. 4332(2)(C). That finding was based upon a 34 page environmental assessment that canvassed the justification for the project, assessed its environmental consequences, and listed measures taken to

mitigate any adverse impacts.¹ Design grants were awarded to RCSD and Ramapo in late 1980.

Before construction could commence or a step 3 grant in aid of construction could be sought, on February 26, 1981, petitioner filed this action to enjoin disbursement of the design grants, alleging, inter alia, that EPA had violated NEPA by preparing only an environmental assessment rather than a full-scale EIS, and had violated requirements applicable to Clean Water Act grants by failure to make three (of the 21) determinations listed by EPA regulations as preconditions for issuing an award of grant assistance. The regulations allegedly violated were: 40 C.F.R. 35.925-7 (treatment works design standards), 35.925-8 (NEPA compliance), and 35.925-13 (sewage collection system standards). After an 11-day trial the district court ruled against petitioner on all claims.

Following the trial, but before the district court had rendered its opinion, petitioner moved to amend its complaint to allege, for the first time, failure by EPA to make 17 other determinations required by 40 C.F.R. 35.925, the agency's construction grant regulations. Petitioner asserted that the amendment would simply conform the pleadings to the proof at trial. Respondents opposed the motion on the ground that they had neither expressly nor implicitly agreed to try the 17 additional claims and might have presented other evidence had such claims been properly before the court. The district court denied the motion to amend on January 25, 1983.

2. The court of appeals affirmed, upholding the EPA's "finding of no significant impact" and rejecting petitioner's claim that the agency had not made necessary determinations prior to awarding the grant. The court of appeals

¹The environmental assessment is reproduced in an appendix to the Brief in Opposition filed by RCSD and the Town of Ramapo at pages A5-A54.

considered petitioner's claims that a full-scale EIS was required because of project impacts on wetlands flood plains and land use, allegedly flawed sewage treatment plant design and public controversy (Pet. App. A14-A23). The court found that EPA did not abuse its discretion or act arbitrarily in concluding that the project would not significantly affect the environment in any of the respects claimed. In rejecting petitioner's claim that an EIS was required by virtue of the public controversy surrounding the project, the court of appeals noted that expansion of an unpopular sewage treatment plant can be expected to generate opposition. But the court observed that mere opposition unaccompanied by a genuine controversy as to the actual effects of the project on the environment does not indicate that preparation of a full-scale EIS is required. Pet. App. A22.

Upholding the district court's denial of petitioner's motion to amend its complaint to charge 17 additional violations of EPA's construction grant regulations (Pet. App. A24 n.10), the court of appeals sustained the agency's action as to the three regulatory violations that had been timely alleged. Although the court suggested that it would have been preferable from the standpoint of a reviewing court for the agency to present the determinations required by 40 C.F.R. 35.925 in concise seriatim fashion, the court concluded, based on its review of the complete administrative record, that the agency had unmistakably made the required determinations (Pet. App. A24-A25).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. No further review is warranted.

I. a. Petitioner contends (Pet. 24-48), first, that EPA failed to make determinations required by 40 C.F.R. 35.925. The short answer is that both the district court and

the court of appeals independently reviewed the administrative record and expressly found that, to the extent placed in issue by petitioner, the necessary determinations had been made (Pet. App. A24-A25, A36-A37, A44).² Those rulings are plainly correct, as is revealed by examination of the environmental assessment prepared by EPA.

The determinations required by 40 C.F.R. 35.925-7 concern cost-effectiveness of the proposed treatment works, adequacy of capacity and reserve capacity, use of the best practicable waste treatment technology (BPWTT)³ and prevention of excessive infiltration/inflow. These matters are covered in the environmental assessment (see RCSD

²In its argument petitioner seems to ignore the rulings below that exclude 17 of the 20 allegedly missing administrative determinations from the scope of this case. Moreover, while it announces its disagreement with those rulings (Pet. 23-24) petitioner does not challenge them in this Court. In any event, the district court plainly did not abuse its discretion by denying a post-trial motion to enlarge drastically the scope of the complaint.

Petitioner complains (Pet. 17-21, 24, 28-29) about the post-argument submissions made by the government to the court of appeals in response to that court's request that the government identify those portions of the administrative record that embody the 17 determinations that petitioner belatedly charged the agency with omitting. Because the court of appeals ultimately upheld the district court's ruling excluding these issues from this case, and did not rely upon the government's supplemental submission in any respect, petitioner's apparent suggestion that it was deprived of some procedural right by the panel's requests for the additional submissions warrants no consideration. We note, moreover, that petitioner was served with a copy of the government's submissions and responded thereto (see Pet. 18, 20-21). Petitioner accordingly cannot claim any prejudice flowing from the court of appeals' clerk's alleged failure to notify their counsel of the requests made of the government.

³EPA has defined BPWTT to be secondary treatment that is cost effective. 40 C.F.R. Pt. 35 App. A; 40 C.F.R. Pt. 133. See *Environmental Defense Fund, Inc. v. Costle*, 439 F. Supp. 980, 1002 n.27 (E.D.N.Y. 1977).

Br. in Opp. App. A8-A9, A12, A14-A16, A19-A20, A28-A29, A30-A31, A39-A40). 40 C.F.R. 35.925-8 merely requires that the provisions of NEPA be satisfied. The very existence of the environmental assessment, coupled with the agency's accompanying finding that a full-scale EIS was not required by NEPA, reflects that the agency made the required determination. Finally, the environmental assessment demonstrates that the determinations regarding sewage collection systems required by 40 C.F.R. 35.925-13 were made (see RCSD Br. in Opp. App. A8-A9, A30-A31).

Petitioner does not undertake to find fault with the fact-bound ruling of the courts below that the allegedly omitted determinations were made. Because the administrative record in this case was more than sufficient to enable the reviewing courts below to ascertain that the agency had discharged its duty to make required determinations, there simply is no reason to consider here "the question of the effect of the failure of an agency to render findings required by statute or by its own regulation as the basis of non-adjudicative agency action" (Pet. 31). A fortiori, petitioner's discussion (Pet. 31-34) of the remedies triggered by such agency failures under statutory regimes that petitioner plainly recognizes to be distinguishable is wholly misdirected.

Equally misplaced is petitioner's reliance (Pet. 34-48) on *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), and *Dunlop v. Bachowski*, 421 U.S. 560 (1975). As the former case makes clear (401 U.S. at 417), formal findings, such as are prescribed by the Administrative Procedure Act for on-the-record rulemaking and adjudication, are not required in the case of less formal agency actions or decisions, such as those involved here. Moreover, because petitioner claimed only that the determinations required by 40 C.F.R. 35.925 had not been made — a factual question best resolved by reference to the administrative record

—and petitioner did not claim that any determinations were arbitrary or capricious, there is no occasion to consider whether discovery should have been made available to supplement the administrative record, or whether the reviewing court was enabled properly to assess the rationality of those determinations.

b. Petitioner seeks (Pet. 48-54) review of the court of appeals' statement that determinations pursuant to 40 C.F.R. 35.925 may be made in some form other than in writing. No question as to oral or implicit findings is presented in the instant case, however. As the court of appeals indicated (Pet. App. A24-A25), EPA's determinations in this case are reflected in the written administrative record; they were therefore made in writing.

Thus, the court of appeals correctly observed that the issue in the case is reduced to one of judicial convenience, and held in that regard that the regulations "do not require that the agency's actions be set down in any particular order or form, or even that its determinations be made in writing" (Pet. App. A24). See *Camp v. Pitts*, 411 U.S. 138, 140-141 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 417. Petitioner cites no authority that suggests that any particular level of administrative formality was necessary in the setting of this case.

2. Petitioner seeks (Pet. 54-59) further review of the court of appeals' ruling that preparation of a full-scale EIS was not required simply because of the opposition of petitioner and others to the underlying project. Petitioner suggests that the court of appeals' ruling discloses an important unresolved issue as to whether "extraordinary" opposition—as opposed to some more ordinary level of opposition—is required to trigger preparation of an EIS. In its search for an issue to present to this Court, petitioner ignores the plain thrust of the district court's ruling.

The court of appeals noted that public opposition cannot in and of itself satisfy the statutory trigger for preparation of an EIS (a "major Federal action[] significantly affecting the quality of the human environment" (42 U.S.C. 4332(2)(C)); otherwise an EIS would invariably be held necessary whenever some party is willing to go to the trouble of suing a federal agency to require its preparation (Pet. App. A22). The court explained, moreover, that Council on Environmental Quality regulations (40 C.F.R. 1508.27(b)(4)) that suggest that the controversial character of a project is pertinent in determining the need for an EIS are directed at situations where there is controversy as to the actual environmental effects of the project under study (Pet. App. A22). Applying the latter criterion, the court of appeals simply observed that the agency's finding that no significant environmental impact such as would warrant preparation of an EIS was portended here was fully supported by the record and was not rendered "controversial" in the relevant sense by opposition to the project (*ibid.*).⁴ Because petitioner does not quarrel with the foregoing analysis, and indeed seems to concede (Pet. 57-59) that a different approach would make an EIS necessary whenever a plaintiff is ready to go to court to insist on preparation of one, no matter what the objective dimensions of the environmental effects to be engendered, the question presented by petitioner does not warrant review by this Court.

⁴Plainly, public opposition to a project is not in itself an environmental impact of the project. See *Metropolitan Edison Co. v. PANE*, No. 81-2399 (Apr. 19, 1983), slip op. 8-9, 11. Thus, to the extent the court of appeals' concluding statement that "[t]he record lacks a sufficient basis to indicate that the opposition to this project was of such an extraordinary nature as to require an EIS" (Pet. App. A22) is read as something other than an impressionistic summary of the reasoning described in the text, it is, if anything, unduly favorable to petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

REX E. LEE

Solicitor General

F. HENRY HABICHT, II

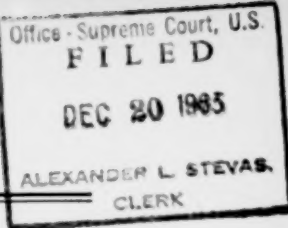
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FEBRUARY 1984

No. 83-857



IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

TOWN OF ORANGETOWN,

Petitioner,

— v. —

ANNE GORSUCH, Individually and as Administrator of the
United States Environmental Protection Agency;
RICHARD DEWLING, Individually and as
Regional Administrator of the United States
Environmental Protection Agency; ROCKLAND COUNTY SEWER
DISTRICT NO. 1; COUNTY OF ROCKLAND; TOWN OF RAMAPO;
TOWN OF CLARKSTOWN; NEW YORK STATE DEPARTMENT OF
CLARKSTOWN; NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION; and ROBERT FLACKE,
as Commissioner of the New York State Department of
Environmental Conservation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	(iii)
STATEMENT OF THE CASE	2
Factual Background	2
Prior Proceedings	7
The Opinion Below	14
POINT I: THE COURT SHOULD NOT REVIEW THE DECISION THAT EPA MADE THE REQUIRED FINDINGS	19
A. The Court of Appeals Applied The Appropriate Standard of Review	21
1. Informal Agency Action Is Judged By The "Arbitrary And Capricious" Standard	21
2. Formal Findings Were Not Required	25
3. Discovery And Testimony Of Agency Personnel Is Not Necessary For Judicial Re- view of This Agency Action	30
B. EPA Made The Necessary Determinations	35
POINT II: THE COURT OF APPEALS WAS CORRECT IN NOT REQUIRING WRITTEN FINDINGS	36

	<u>Page</u>
POINT III: THE COURT OF APPEALS APPLIED THE CORRECT STANDARD FOR ASSESS- ING THE LEVEL OF CONTROVERSY	41
CONCLUSION	47
APPENDIX	
Finding of No Significant Impact and Environmental Assessment	A-1

TABLE OF AUTHORITIES

Cases:	<u>Page</u>
<u>Camp v. Pitts</u> , 411 U.S. 138, 93 S.Ct. 1241 (1973)	31, 32, 33, 34, 37, 39
<u>Citizens to Preserve Overton Park, Inc., v. Volpe</u> , 401 U.S. 402 (1971)	22, 23, 25, 26 27, 37 38
<u>F.C.C. v. National Citizens Committee for Broadcasting</u> , 436 U.S. 775 (1978)	24
<u>Fund For Animals v. Frizzell</u> , 530 F.2d 982 (D.C. Cir. 1975)	46
<u>Hanly v. Kleindienst</u> , 471 F.2d 823 (2d Cir. 1972), cert. denied 412 U.S. 908 (1972)	43, 46
<u>Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Companies, et al.</u> , — U.S. —, 103 S.Ct. 2856 (1983)	28, 29, 30, 37 39, 40
<u>Rucker v. Willis</u> , 484 F.2d 158 (4th Cir. 1973)	46

	<u>Page</u>
<u>Scenic Hudson Preservation Conference v. Federal Power Commission, 453 F.2d 463 (2d Cir. 1971), cert. denied 407 U.S. 926 (1972)</u>	24
<u>Town of Orangetown v. Gorsuch et al., Slip Op. (2d Cir. 1983)</u>	17, 22, 28, 34, 36, 37 43, 45 46
 Federal Statutes:	
Administrative Procedure Act	
5 U.S.C. §552 <u>et seq.</u>	21
5 U.S.C. §553	24
5 U.S.C. §554	24
5 U.S.C. §556	24
5 U.S.C. §557	24
5 U.S.C. §706(2) (A)	22
 Clean Water Act	
33 U.S.C. §§1251 <u>et seq.</u>	4
33 U.S.C. §1283	20
33 U.S.C. §1284	20

	<u>Page</u>
National Bank Act	
12 U.S.C. §26	32
National Environmental Policy Act	
42 U.S.C. §§4321 <u>et seq.</u>	5, 7
Federal Regulations:	
40 C.F.R. §§35.925 <u>et seq.</u>	9, 20, 35
40 C.F.R. §35.925-7	9, 35
40 C.F.R. §35.925-8	9, 35
40 C.F.R. 35.925-13	9, 35
40 C.F.R. §1508.27	17, 42

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NO. 83-

TOWN OF ORANGETOWN,

Petitioner,

- against -

ANNE GORSUCH, Individually
and as Administrator of
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mental Protection Agency;
RICHARD DEWLING, Individual-
ly and as Regional Admini-
strator of the United States
Environmental Protection
Agency; ROCKLAND COUNTY SEWER
DISTRICT NO. 1; COUNTY OF
ROCKLAND; TOWN OF RAMAPO;
TOWN OF CLARKSTOWN; NEW YORK
STATE DEPARTMENT OF ENVIRON-
MENTAL CONSERVATION; and
ROBERT FLACKE, as Commission-
er of the New York State De-
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Conservation,

Respondents.

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Factual Background

The Rockland County Sewer District No. 1 ("RCSD") is comprised of a number of municipalities in Rockland County, New York. It operates a sewage treatment plant which is located in a corner of Orangetown, New York. The Town of Orangetown, which is included in Rockland County, refused to be a part of the sewer district when the district was formed, but it does have a vote on the district's governing board of commissioners. Orangetown operates its own

sewage treatment plant, which is located 1,800 feet away from the RCSD plant.

The RCSD plant was built in the 1960's. In the course of time, it has become outmoded and overloaded. When flows of untreated effluent to the plant exceed the plant's treatment capacity, untreated or partially treated sewage is discharged to the Hudson River through the outfall pipe leading from the plant. In the mid-1970's, in order to address the need to increase sewage treatment capacity within the district and to cope with a growing threat to groundwater quality caused by failing septic systems and antiquated sewers, RCSD sought the help of the United States Environmental Protection Agency ("EPA") and the New York State Department of Environmental Conservation ("DEC"), pursuant to a

construction grants program for wastewater treatment plants under the Clean Water Act, 33 U.S.C. §§1251 et seq. RCSD, together with the federal and state agencies, began an extensive facilities planning process.¹ That process involved analysis of present and future needs for sewage treatment in the area, analysis of alternative treatment methods and collection routes and extensive environmental analysis, and extended over a four-year period. In keeping

¹EPA finances the construction of wastewater treatment facilities in three steps. Step 1 grants finance the development of feasibility studies and other preliminary planning, which results in a facilities plan which is submitted to EPA for approval. Step 2 grants finance the preparation of detailed plans and design specifications for construction based on the facilities plan. Step 3 grants finance actual construction.

with the National Environmental Policy Act, 42 U.S.C. §§4321 et seq. ("NEPA"), (which requires environmental review of certain federal actions,) NEPA's implementing regulations, and the Clean Water Act, extensive public participation also took place. At practically every public hearing, Orangetown, the petitioner in this action, appeared and submitted extensive criticism of proposals that were the subject of the facilities planning process. Ultimately, a facilities plan was completed. That plan called for the expansion of the RCSD plant, the upgrading of certain sewers and collection systems which transport effluent to the plant, the installation of extensive odor control mechanisms and the construction of facilities to process sludge -- the by-product of sewage

treatment processing. At the conclusion of the facilities planning process and in accordance with the procedures set forth in the Clean Water Act and its implementing regulations, RCSD applied to EPA for a Step 2 grant for development of plans and design specifications.

Prior to offering the Step 2 grant to RCSD in September, 1980, EPA reviewed the facilities plan, which included analysis of and response to comments received at public hearings, and prepared a written environmental assessment ("EA"). On the basis of the environmental review and assessment, EPA issued a Finding of No Significant Impact ("FONSI"). (The FONSI and EA are reproduced in the appendix attached to this brief.) Upon finding that the project would not have a significant impact

on the environment, EPA was not required to prepare a more detailed environmental impact statement in accordance with the National Environmental Policy Act, 42 U.S.C. §4321 et seq. ("NEPA").

Prior Proceedings

After RCSD accepted the Step 2 grant from EPA, Orangetown, having previously opposed every aspect of the project at every opportunity, began this lawsuit in the United States District Court for the Southern District of New York. It sought to enjoin the release of funds by EPA to RCSD, claiming that EPA did not comply with certain of its own regulations relating to the processing and issuance of construction grants. It also charged that EPA had violated NEPA because it had not prepared an environmental impact statement. The

complaint also alleged that DEC had not met certain requirements of state law. Finally, Orangetown sought monetary damages and injunctive relief on the ground that the operation of the RCSD plant constituted a nuisance. RCSD asserted a counterclaim, charging that the operation of the nearby Orangetown sewage treatment plant constituted a nuisance.

The District Court dismissed the Orangetown state law claims on motion. Trial began in October, 1982.² After eleven days of trial, the Court dismissed both nuisance claims from the bench after summation by counsel. After receiving briefs on the remaining issues,

²At the commencement of trial, Orangetown amended its complaint to include the first phase of construction, Step 3 Phase 1.

the Court then dismissed all of Orangetown's claims, holding that EPA's finding that the project would have no significant environmental impact was proper, and that EPA's procedures in issuing the grant complied with applicable statutory and regulatory law, including the technical determinations challenged by Orangetown in its pleadings.

In its complaint, Orangetown charged that EPA had not made certain determinations relating to environmental review, waste treatment technology, cost-effectiveness and plant capacity, as required by its regulations. 40 C.F.R. §§35.925-7, 35.925-8 and 35.925-13. The EPA regulations also specify that 17 other findings are to be made, although Orangetown never stated in its pleadings or during the course of trial,

that it was challenging findings other than those required by the three subsections enumerated in its complaint.

Several weeks after trial, and before the Court rendered its opinion, Orangetown moved to amend its complaint to include a challenge with respect to the additional 17 findings. The District Court denied the motion in that the defendants -- both RCSD and EPA -- demonstrated there had been no implied consent to try these additional questions, so they had not been contested at trial; thus it was inappropriate for Orangetown to attempt to inject a host of new issues after the close of trial.

Orangetown filed a Notice of Appeal, and the Second Circuit granted RCSD's motion to have the appeal heard on an expedited basis. EPA regulations

require that work be commenced within a specified period after a grant is awarded. Because of bonding difficulties, RCSD faced the risk of losing the grant necessary to upgrade its inadequate sewage treatment facilities simply as the result of the pendency of litigation, even though Orangetown had never established that a single one of its claims was meritorious.

In an extensive opinion, the Court of Appeals affirmed the District Court's decision to dismiss Orangetown's claims in all respects. The Court had before it the entire administrative record, which consisted of the nine-volume facilities plan as well as several additional boxes of correspondence, analysis and other written material, all of which EPA had put in evidence in the proceed-

ings below. While the Second Circuit was considering this case, a clerk of the court apparently contacted the U.S. Attorney's office seeking information about the administrative record relating to the 17 findings which the District Court had ruled were not in issue when it denied Orangetown's motion to amend its pleadings. The U.S. Attorney's office provided the requested information in an extensive letter. The Court of Appeals, however, apparently did not rely on the information submitted. It affirmed the denial of Orangetown's post-trial motion to amend the pleadings to include a challenge to the remaining 17 EPA determinations. The appellate court concurred with the District Court's ruling that the only determinations were

appropriately at issue were those enumerated in the pleadings.

Throughout the proceedings, bond counsel had instructed RCSD that the pendency of the litigation prevented him from providing the prerequisite opinions for the issuance of bonds necessary to begin the project. In an apparent effort to continue litigation endlessly, Orangetown has filed the Petition for a Writ of Certiorari, which is the subject of this brief. Orangetown has also started two new proceedings, one in the state court and another in the United States District Court, in which it seeks to block the issuance of the next phase of the Step 3 grant, which RCSD has accepted. That phase will provide for rebuilding of the processing facilities within the RCSD plant. While Orangetown

pursues every opportunity to litigate against RCSD and the governmental agencies responsible for administering the water pollution control program, and thus delay or prevent the modernization of the RCSD plant, improperly treated sewage continues to flow into the Hudson River and failing septic systems within the sewer district jeopardize groundwater supplies within the region.

The Opinion Below

The Court of Appeals, in a unanimous, 26-page opinion written by Hon. Lawrence W. Pierce, affirmed the District Court's dismissal of the action in every respect. It observed that an environmental impact statement is not required for federal actions not "significant" within the meaning of NEPA. It found that the EPA's determination of

"no significant impact" is neither a rulemaking nor adjudicatory function, but a factual finding made by the agency with particular expertise in environmental matters. Thus, it found that review was limited to a determination whether the agency had been arbitrary or capricious.

The Court then proceeded to analyze every issue that Orangetown asserted that EPA had given inadequate consideration when it issued the FONSI. In examining Orangetown's claims with respect to wetlands, the Court reviewed the analysis of wetlands considerations contained in the administrative record, EPA's comments to RCSD and DEC about wetlands during the facilities planning process, and changes in the project at EPA's insistence that wetlands impact be reduced. On the basis of this extensive

review of the record, the Second Circuit determined that EPA's decision with regard to wetlands effects was neither arbitrary or capricious. Similarly, the Court analyzed the administrative record with respect to its treatment of flood-plains impacts, land use impacts, and sewage treatment plant design. The Second Circuit opinion contains several pages of analysis with respect to each of the issues that Orangetown raised; in each instance the Court found that EPA did not abuse its discretion or act arbitrarily in concluding that the project would not significantly affect the environment.

In a separate subsection, the Court analyzed Orangetown's contention that this project required an environmental impact statement on the basis of the

claim it was "highly controversial" under the guidelines issued by the Council on Environmental Quality. See 40 C.F.R. §1508.27. The Court noted that expansion of an unpopular sewage treatment plant can be expected to generate opposition. It observed that under existing precedent, a project is "highly controversial" when "a substantial dispute exists as to the size or effect of the major federal action rather than to the existence of opposition to a use." Town of Orangetown v. Gorsuch et al., Slip Op. at 6638 (2d Cir. 1983), Petition at A-22. The Court found that in light of the evidence supporting the FONSI, more than mere speculation that the plant expansion would increase odor problems would be necessary before the project

could be called "highly controversial."

In sum, the Court found that EPA's finding of no significant impact and its conclusions with respect to all of the elements of that finding were supported by substantial evidence, were not arbitrary and capricious, and did not represent an abuse of discretion. It therefore determined that it was not within the competence of the Court to overrule the agency's determination.

In considering Orangetown's claims relating to alleged violations of EPA's procedural regulations for grant-making, the Court undertook its own review of the administrative record. It upheld the District Court's ruling that the record revealed that in making certain technical determinations, EPA complied

with the terms of the applicable regulations and that the objectives of those regulations were accomplished.

The Court also reviewed the evidence presented at trial with respect to the nuisance claims. It found no basis for overturning the District Court's ruling that Orangetown's evidence failed to prove that the County plant operation resulted in a public nuisance. Finally, the Court upheld the District Court's determination in dismissing Orangetown's claim that DEC did not comply with New York State's environmental quality review act.

POINT I

THE COURT SHOULD NOT
REVIEW THE DECISION THAT
EPA MADE THE REQUIRED
FINDINGS

The first question that petitioner

raises for review by this Court is whether or not EPA failed to make certain determinations required under the Clean Water Act, 33 U.S.C. §§1283 and 1284, and its implementing regulations, 40 C.F.R. §35.925 et seq. and if so, whether such failure rendered the grant at issue unlawful. The District Court and the Court of Appeals both conducted reviews of the extensive record of administrative action in this case, after which they both found that the agencies had complied with that set of regulations, and that the grants were lawful. Petitioner claims that in spite of the careful factual review given these issues by the lower courts, they merit review by the Supreme Court because of the importance of the issue of the enforceability of the statutory and regulatory requirements. Petitioner suggests that

it is an open question whether or not the standard to be applied to such an action, which is neither rulemaking nor adjudication, should be as rigorous as that applied by the Administrative Procedure Act ("APA"), 5 USC §§552 et seq., to actions which are either rulemaking or adjudicatory. There is, however, no need for the Supreme Court to address this question anew. It is well settled by the Supreme Court in prior opinions, and the decision of the Court of Appeals fits well within the guidelines thus set forth. This case presents no issues which would call into question the established law.

A. The Court of Appeals Applied The Appropriate Standard of Review

1. Informal Agency Action Is Judged By The "Arbitrary And Capricious" Standard

In assessing the administrative ac-

tion here, the Court of Appeals applied the standard of review set forth in the Administrative Procedure Act ("APA"), which provides that agency action may be overruled by a court only if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706 (2)(A) (1976); Town of Orangetown v. Gorsuch et al., Slip Op. at 6628-29, Petition at A-13.

There is no reason, based on the facts of this case, for this Court to reconsider the standard of review as applied. Administering and issuing grants under the construction grants program of the Clean Water Act is neither a rule-making nor an adjudicatory function. In Citizens to Preserve Overton Park, Inc.

v. Volpe, 401 U.S. 402 (1971) ("Overton Park"), at issue was the approval by the Secretary of Transportation of the construction of an interstate highway through a public park in Memphis. Such a construction project, and the necessary approvals for it, involved neither rulemaking nor an adjudication. The Supreme Court had no difficulty in determining that the action was therefore governed by the arbitrary and capricious standard of the APA, rather than the more rigorous requirements applied to formal, on-the-record actions like formal rulemaking and adjudication. 401 U.S. at 414-15. In the APA, Congress chose to set higher standards for agencies with regard to record-keeping, public statements and due process when they

were acting in a quasi-judicial or quasi-legislative function. 5 U.S.C. §§553, 554, 556, 557. See F.C.C. v. National Citizens Committee for Broadcasting, 436 U.S. 775, 802-803 (1978); Scenic Hudson Preservation Conference v. Federal Power Commission, 453 F.2d 463, 468 (2d Cir. 1971), cert. den. 407 U.S. 926 (1972). Technical findings made by agencies in the course of sewage treatment construction grants, as in highway construction projects, are internal and preliminary in nature, and result from the exercise of an expert function, which is neither legislative nor judicial. The agencies in such actions are making decisions based on administrative and technical expertise and are neither assessing penalties or punishments

against individuals before them, nor setting forth prospective regulations to be followed in the future. This case presents no reasonable opportunity to depart from the well-established understanding of the Congressional mandate that a higher standard of review should be applied to rulemaking and adjudication than to grant issuance.

2. Formal Findings Were
Not Required

The Court of Appeals was correct in not requiring formal findings when it analyzed the agency's record of its action in this case. In Overton Park, the relevant statutes prohibited the Secretary of Transportation from authorizing the use of federal funds to finance

construction of a highway routed through a public park if a feasible alternative existed, and further required the Secretary to minimize any harm to the park if there was no alternative route available. The Secretary's approvals of the route and design of the highway were unaccompanied by a statement of the Secretary's factual findings on those points. In reviewing the agency action in that case, the District Court had relied solely on affidavits prepared for litigation by both agency representatives and representatives of the challengers to the action.

The Supreme Court found that although the Secretary did not make formal findings as to alternatives and the minimization of harm, the statutes did not require formal findings, and therefore

that failure alone did not mandate remand to the agency. 401 U.S. at 417. In that case, because the entire administrative record was not before the Court, it was unable to determine whether or not informal findings or other evidence of the determinations were included in the record. The Court therefore remanded the case to the District Court, with instructions that the lower court review the entire administrative record to determine the appropriateness of the Secretary's decision.

The reasoning in Overton Park is therefore perfectly consistent with the reasoning of the Court of Appeals in the case at bar. The difference between the two cases is that, here, the entire administrative record was before the District Court and the Court of Appeals.

Both courts had the opportunity to review the entire record, and both courts found evidence to support a finding that the EPA had complied with the statute and regulations. The Court of Appeals stated, "all that is necessary is that a reviewing court be able to trace from the written record the path followed by the agency in deciding to take a particular action ..." when the statute does not require formal findings. Town of Orangetown v. Gorsuch et al., Slip Op. at 6641, (2d Cir. 1983); Petition at A25.

This standard is consistent not only with Overton Park, but with the most recent Supreme Court decision reviewing informal agency action, Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Companies, et al., ___ U.S. ___, 103 S.Ct. 2856

(1983) ("Motor Vehicles"). In that case, this Court overturned the action by the Department of Transportation rescinding a rule requiring that new motor vehicles be equipped with passive restraints to protect the safety of vehicle occupants in the event of a collision. The Supreme Court found that the agency action was arbitrary and capricious because the administrative record demonstrated that the agency had not given sufficient consideration to a relevant alternative, and because the record did not provide the basis for concluding that the rescission was the result of reasoned decisionmaking. The Court therefore examined the administrative record compiled by the agency in the course of taking its action, and found that record insufficient to jus-

tify the action. That approach is precisely the same approach that the Court of Appeals took in analyzing agency action in the case at bar. In this case, however, unlike Motor Vehicles, the Court found that the administrative record did substantiate agency action.

3. Discovery And Testimony Of
Agency Personnel Is Not
Necessary For Judicial
Review Of This Agency Action

The limitations placed by the district court on petitioner's delving into the mental processes of agency personnel, either during discovery or trial, do not strengthen petitioner's argument that a stricter standard of judicial review should have been applied in this case. Petitioner seems to argue that because it asserted during trial that it failed to understand the administrative

record, it therefore was entitled to obtain individual testimony from agency personnel to explain that record. However, the cases cited by petitioner do not support it in that argument. In Camp v. Pitts, 411 U.S. 138 (1973), an applicant brought suit to compel the Comptroller of the Treasury to issue a bank charter to it. The Comptroller had twice denied the application. The Court there found that the statute did not require the Comptroller to make formal findings on the record when passing on applications for new banking authorities. The court cited language from the National Bank Act, which in fact used similar language to that of the Clean Water Act in referring to the agency decisionmaking. The National Bank Act

stated that the Comptroller was to "ascertain" certain specific facts with regard to the qualifications of the applicant, in considering the application. 12 U.S.C. §26. Similarly, the Clean Water Act and regulations state that the Administrator shall "determine" certain facts exist. Without more, neither statute mandates formal findings.

In Camp, the Court went on to find that the Court of Appeals had been in error in ordering a de novo hearing. It stated that the only deficiency suggested in the agency action was that the agency inadequately explained its decision. The Court stated that "such a deficiency was not enough to warrant a de novo hearing. A trial court should apply the arbitrary and capricious standard set forth in the APA and "in apply-

ing that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. at 141.

The Court further held that if there had been a complete absence of explanation for the administrative action in the record, then perhaps the court could obtain from the agency "either through affidavits or testimony, such additional explanation of the reasons for the agency decision as made prove necessary." Id. at 143. However, the Comptroller's record provided some explanation of its action. "The explanation may have been curt, but it surely indicated the determinative reason for the final action taken ... The validity

of the controller's final action must, therefore, stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review." Id. The agency action in the case at bar presents the same situation. While "a clear and concise document outlining seriatim" the required findings might have been desirable for ease of review by the Court, the existing form of the record does not provide petitioner with the opportunity to examine witnesses from the agency. Town of Orangetown v. Gorsuch et al., Slip Op. at 6640 (2d Cir. 1983); Petition at A-24. The agency action must stand or fall on the administrative record. Both lower courts determined that the action should stand.

B. EPA Made The Necessary Determinations

The determinations at issue in this case are those included in 40 C.F.R. §35.925-7, §35.925-8, and §35.925-13, which refer to the waste treatment technology, capacity and cost-effectiveness of the planned plant and collection systems, and the environmental review performed by the agency.³ The Court of Appeals found that the administrative

³As discussed above, the Court of Appeals upheld the District Court's determination that since the remaining determinations in 40 C.F.R. §35.925 et seq. were not placed in issue in the pleadings or during trial, they were not subject to review in this action. Petitioner's continued post-trial insistence that the other determinations should receive judicial review cannot change the fact that petitioner failed to make known its challenge to those determinations prior to or during trial. Further review of the District Court's ruling on that motion is unwarranted.

record provided sufficient documentation of the agency's decision on these issues, and that therefore the agency complied with applicable law in issuing the grants. Town of Orangetown v. Gorsuch et al., Slip Op. at 6641 (2d Cir. 1983), Petition at A-25. The Environmental Assessment prepared by EPA, which was promulgated along with the Finding of No Significant Impact, evidences agency determinations on all the issues raised by the relevant regulations. In addition, the administrative record includes documents submitted by the grantees which provide extensively detailed studies of those issues.

POINT II

THE COURT OF APPEALS WAS CORRECT IN NOT REQUIRING WRITTEN FINDINGS

The second reason that petitioner

sets forth for granting the petition is related to its first point, and must be rejected on the same basis. The Court of Appeals found that the EPA regulations "do not require that the agency's actions be set down in any particular order or form, or even that its determinations be made in writing." Town of Orangetown v. Gorsuch et al., Slip Op. at 6640, (2d Cir. 1983), Petition at A-24. Petitioner apparently contends that this Court did not mean what it said in cases like Overton Park, Camp v. Pitts, and Motor Vehicle, when it required that the Court review the administrative record as a whole when a statute does not require formal findings. Petitioner constructs a dichotomy in the petition, reasoning that if written findings are not required then the findings must be either oral or implied. It then states

that oral findings would require oral testimony, and that implied findings are no findings at all. This reasoning, according to petitioner, leads neatly back to the conclusion that discovery of and testimony by agency personnel should have been permitted.

The fatal flaw in this reasoning is that the Supreme Court and lower courts have consistently permitted examination of the administrative record for evidence of informal or implied findings. In Overton Park, the Supreme Court instructed the District Court to peruse the administrative record for such findings on remand. It did not direct the lower court to take oral testimony, but allowed the district court some flexibility in determining the necessity for such testimony after its examination of

the record. 401 U.S. at 419-20. The same result prevailed in Camp v. Pitts. 411 U.S. at 143. In both cases, the Court found that the statute did not require formal findings, and in neither case did the Court order that oral testimony must be taken. If the Court did not believe that implied findings were acceptable, then it would have ordered the District Court to take oral testimony, or would have remanded to the agency for express, formal findings. Finally, in Motor Vehicle, the Court did not strike down the agency's rescission on the basis of a procedural deficiency in the form of failure to state formal findings. It found that upon review, the agency's record proved to be sub-

stantively insufficient to justify the action.⁴

As in the cases discussed above, the Court of Appeals here found that formal findings were not required; it examined the administrative record for evidence of the basis for the administrative action. On that basis, it upheld the agency action. Contrary to petitioner's characterization, the Court did not relieve EPA from its obligation to comply with the regulations, but

⁴It is important to note that in Motor Vehicle, the Supreme Court considered it "relevant that Congress required a record of the rulemaking proceedings to be compiled and submitted to a reviewing court, 15 U.S.C. §1394 [motor vehicle safety standards promulgation], and that agency findings under the Motor Vehicle Safety Act would be supported by 'substantial evidence on the record considered as a whole.'" (Citations omitted). 103 S.Ct. at 2856.

rather found that the agency had complied with the regulations. There is nothing illogical or inconsistent about this approach, and thus there is no need for this Court to review the lower courts' decisions.

POINT III

THE COURT OF APPEALS APPLIED
THE CORRECT STANDARD FOR
ASSESSING THE LEVEL OF CONTROVERSY

Petitioner asserts a final, unfounded claim that this Court should review the ruling by the Court of Appeals that the amount of controversy surrounding this project did not mandate an Environmental Impact Statement ("EIS") pursuant to NEPA. The decision in the Second Circuit is entirely consistent with the prevailing decisions in

prior cases, and leaves no questions open for settlement by this Court.

The guidelines of the Council on Environmental Quality ("CEQ") state that consideration of environmental impacts for purposes of deciding whether to require an EIS, should include an evaluation of "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. §1508.27. As discussed above, after reviewing the administrative record of this action, both the District Court and the Court of Appeals found that EPA had not been arbitrary or capricious in issuing the Finding of No Significant Impact, with respect to every issue raised by petitioner, including that of public controversy. The Court of Appeals found

that "the record lacks a sufficient basis to indicate that the opposition to this project was of such an extraordinary nature as to require an EIS." Town of Orangetown v. Gorsuch et al., Slip Op. at 6638 (2d Cir. 1983), Petition at A22.

Petitioner exaggerates the choice of of the word "extraordinary" by the Court of Appeals, contending that with that one word, the Court intended to set a new standard for the level of controversy requiring an EIS. To the contrary, however, the decision by the Court of Appeals on this issue is completely in line with the cases cited by petitioner. In Hanly v. Kleindienst, 471 F.2d 823, 830 (2d Cir. 1972), cert. denied 412 U.S. 908 (1972), the Court stated that "... the term 'controver-

sial' apparently refers to cases where a substantial dispute exists as to the size, nature or effect of the major federal action rather than to the existence of a use ...". In the case at bar, it is precisely the use of the site as a sewage treatment plant, improved or unimproved, which is the source of some controversy in the neighborhood, rather than the environmental effects of the project. The Petition for Writ of Certiorari makes this abundantly clear when it states:

"The [Sewer] District was born in the controversy inherent in one community's sending its sewage to another. The controversy deepened through the years as the County plant emitted massive odors, reshaping life in the areas of Orangetown around it."

Petition at 54-55. Petitioner goes on to say that the existence of the improvement project "deepened and broad-

ened" the controversy that surrounded the plant itself. As the Court of Appeals found, in this case the record revealed that the local opposition to the project's effects grow out of "mere speculation that the plant expansion will increase odor problems, rather than alleviate such problems," which does not amount to the sort of controversy with respect to environmental impacts that would mandate an EIS. Town of Orangetown v. Gorsuch et al., Slip Op. at 6638 (2d Cir. 1983); Petition at A-22.

To rule that any such vocal opposition makes the effects of the project "highly controversial" according to the terms of the CEQ guidelines, "would require an impact statement whenever a threshold determination dispensing with one is likely to face a court challenge

[and would] surrender the determination to opponents of a federal action, no matter whether [the project is] major or not, nor how insignificant its environmental effects might be." Rucker v. Willis, 484 F.2d 158, 162 (4th Cir. 1973). See also Town of Orangetown v. Gorsuch et al., Slip Op. at 6638 (2d Cir. 1983); Hanly v. Kleindienst, 471 F.2d at 830 n.9A; Fund for Animals v. Frizzell, 530 F.2d 982, 988-89 n.15 (D.C. Cir. 1975). The ruling on this issue by the Court of Appeals is therefore grounded in, rather than inconsistent with, relevant case law. The Court did not establish a new standard for decision; it simply analyzed the facts of this case in light of established standards, and supported the EPA decision not to require an EIS.

No issue remains which would demand the consideration of this Court.

CONCLUSION

On the basis of the foregoing, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

PETER A. A. BERLE
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270:101

APPENDIX

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Region II
26 Federal Plaza
New York, New York 10278

August 29, 1980

To All Interested Govern-
ment Agencies and Public
Groups:

In accordance with the procedures for
the preparation of environmental impact
statements, an environmental review has
been performed on the proposed agency
action below:

Project Name: Rockland County Sewer
District No. 1 (RCSD No.
1) sewage treatment plant
expansion, sludge hand-
ling facilities and in-
terceptor sewers.

Project Numbers: C-36-744-03 (Step 2
Grant)
RCSD No. 1

C-36-1253-01 (Step 2
Grant)
Town of Ramapo

Purpose of Project: The purpose of this pro-
ject is four fold: to re-
place failing individual
septic systems in Ramapo
with collection sewers;
to provide interceptor
sewers to convey sewage

from the Towns of Ramapo and Clarkstown to the RCSD No. 1 STP; to expand the overloaded RCSD No. 1 STP to treat existing and future flows from the proposed service area; to provide facilities to process sludge from the RCSD No. 1 STP.

Project
Location:

Towns of Ramapo, Clarkstown and Orangetown, New York

Project
Description:

Preparation of plans and specifications for construction of collection sewers, interceptor sewers, pump stations, STP expansion and sludge handling facilities as described in detail in Section IV of the attached environmental assessment.

Proposed
Eligible
Project
Costs:

\$3,758,380 -
RCSD No. 1

\$ 674,000 -
Town of Ramapo

EPA Grant
(75%):

\$2,858,630 -
RCSD No. 1

\$ 506,000 -
Town of Ramapo

Our environmental review of this project indicates that no significant environmental impacts will result from the proposed action. Consequently, we have made a preliminary decision not to prepare an environmental impact statement (EIS) on the project.

This decision is based on a careful review of the engineering report, the environmental information document, and other supporting data. All of these documents, along with the environmental assessment, are on file at the EPA regional office, where they are available for public scrutiny upon request. A copy of the environmental assessment is enclosed for your review.

Both the State of New York and the EPA recognize that this project is located in an Air Quality Control Region (AQCR). This fact has been accounted for in our review.

Comments supporting or disagreeing with this decision may be submitted to the EPA for consideration. All comments must be received within thirty (30) calendar days of the date of this finding of no significant impacts (FNSI). Please address your comments to the Chief, New York and Virgin Islands Section, Environmental Impacts Branch, Room 400. After evaluating any comments received on the project, the EPA will make a final decision. However, no administrative action will be taken on the

project for at least thirty (30) calendar days after the date of this FNSI.

Sincerely yours,

Charles S. Warren
Regional Administrator

Enclosure

Environmental AssessmentI. Project Identification

Project Name: Rockland County Sewer District No. 1 sewage treatment plant, sludge handling facilities, and interceptor sewers

Town of Ramapo collection sewers

Name and Address of Applicants: Mr. Charles S. Stewart, Jr., P.E. Executive Director Rockland County Sewer District No. 1 4 Route 340 Orangeburg, New York 10962

Project Numbers: C-36-744-03 (Step 2 Grant), Rockland County, New York
C-36-1253-01 (Step 2 Grant), Town of Ramapo, New York

Project Location: Towns of Ramapo, Clarkstown and Orangetown, New York

II. Description of Facility Planning Area

The facility planning area is located in

the Towns of Clarkstown and Ramapo, approximately 50 kilometers (30 miles) from New York City (see Figure 1). It encompasses approximately 190 square kilometers (75 square miles), representing the unincorporated parts of the towns. Although the Rockland County Sewer District No. 1 sewage treatment plant (RCSD NO. 1 STP), which receives flows from Ramapo and Clarkstown, is located in Orangetown, Orangetown does not contribute flows to the RCSD STP and thus is not included as part of the planning area.

The facility planning area is characterized by gently rolling hills and valleys. There are five natural drainage basins within the area defined by the names of the respective bodies of water as follows: Mahwah River, Minisceongo Creek, Saddle River, Pascack Brook and Hackensack River. The planning area has a rich diversity of inland wetlands, many of which are associated with its creeks, streams and rivers. As discussed in Section VII-B of this environmental assessment, grant conditions are being used to prohibit hook-ups to the proposed sewer system from future development located in wetland and floodplain areas.

Land use in the planning area is predominantly residential, with industrial and commercial development along the major roadways, railroads and waterways. The population of the planning area is projected to increase from approximately

160,000 to 201,000 over the 20 year design period of the proposed sewerage facilities. The population projections are based on recent development plans, zoning, and a constraints analysis which excluded environmentally sensitive areas (such as wetlands, floodplains, agricultural lands and steep slopes) from development. These projections are lower than the population projections, prepared by the New York State 208 Water Quality Management Plan.

Large portions of the planning area are currently served by collection and interceptor sewers and pump stations and forcemains. Unsewered portions of the planning area are served by individual on-site disposal systems. Existing (and proposed) sewers are tributary to the existing RCSD No. 1 STP which discharges treated effluent to the Hudson River. Some existing sewers also convey wastewater to the Town of Ramapo, privately operated treatment plants and to the Haverstraw Joint Regional Sewerage Board facilities. Sludge resulting from wastewater treatment at the STP is currently disposed of at the Clarkstown sanitary landfill.

III. Purpose and Need for Project

The purpose of this project is four fold: to replace failing individual septic systems in Ramapo with collection sewers; to provide interceptor sewers to convey sewage from the Towns of Ramapo and Clarkstown to the RCSD No. 1 STP; to expand the overloaded RCSD No. 1 STP; to

provide facilities to process sludge from the RCSD No. 1 STP.

Collection sewers

Existing on-site subsurface disposal systems in Ramapo are failing because of impermeable soils, shallow depth to bedrock, small lot sizes or seasonal high water tables. Surface discharges of raw sewage as a result of these conditions are causing odor problems, represent a public health hazard and are degrading the quality of surface waters in the area. Collection sewers are proposed to replace these failing on-site systems (see Figures 2, 3, 4, 5, and 6).

Interceptors

Interceptor sewers are required to convey sewage from the proposed collection areas as well as from eight small public and private STPs in Ramapo to the RCSD No. 1 STP (see Figures 7, 8, and 9). In addition, some of the interceptors will also facilitate gravity conveyance of wastewater thereby eliminating existing pumping stations. Cost-effective analyses found it less expensive to abandon the eight STPs and treat their flows at an expanded RCSD No. 1 STP than to upgrade and expand the small STPs.

RCSD No. 1 STP Expansion

The RCSD No. 1 STP has a design capacity to treat 3,800 cubic meters (10 million gallons per day) but present wastewater flows substantially exceed this quanti-

ty. A large part of the excessive flows at the plant is due to the infiltration of groundwater and inflow of stormwater (I/I) into the interceptor and collection system. On May 30, 1980, the U.S. Environmental Protection Agency (EPA) issued a finding of no significant impact/environmental assessment (FNSI/EA) for the design and rehabilitation of a portion of the sewer system where it is cost-effective to remove I/I rather than treat it at the STP. As part of the project presently being proposed, the RCSD No. 1 STP will be expanded to 8,500 cu m (25 mgd) to handle existing and future sewage flows from the proposed service area as well as I/I that is cost-effective to treat rather than remove from the sewer system (see Figure 11).

Sludge Handling Facilities

The existing sludge handling facilities at the RCSD No. 1 STP are inadequate to process the increased sewage flows at the plant. Under the proposed project, sludge will be composted at the Clarkstown sanitary landfill site and land applied as a soil conditioner within Rockland County (see Figure 12).

IV. Detailed Description of Selected Plans

Interceptors

The proposed project consists of the Mahwah River Basin, Minisceongo Creek Basin, and Phillips Hill Road-Conklin Road interceptor systems and the Upper

Main Interceptor. The Mahwah River Basin is located in the western portion of the sewer district and encompasses about one third of the Town of Ramapo. The Mahwah interceptor system will serve eleven schools and an existing residential population of approximately 10,000 people. It will eliminate two existing pump stations and three existing STPs. As can be seen in Figure 7, it will consist of seven interceptors: the Mahwah, Pomona Heights, Wilder Road, Willow Tree Road, Grandview Avenue, Viola Road and Montebello Road interceptors. The interceptor system will require seven pump stations and consist of 2.5 km (7.5 mi) of gravity sewer ranging from 20 cm (8 in) to 75 cm (30 in) in diameter and 0.9 km (2.8 mi) of forcemain.

The Minisceongo Creek Basin is located in the northeastern portion of the Town of Ramapo and encompasses two thirds of the Village of Pomona. The Minisceongo interceptors will serve eight hospitals and schools and an existing population of 2,200. It will provide for a portion of the village which currently connects to the Haverstraw STP to tie into the RCSD No. 1 STP. This system will consist of the Pomona, Mount Ivy North and Summit Park interceptors (see Figure 8). It will require three pump stations and consist of about 9 km (3 mi) of gravity line ranging from 20 cm (8 in) to 45 cm (18 in) in diameter and 0.6 km (2 mi) of force main.

The Phillips Hill Road interceptor will provide service to a portion of the Town

of Ramapo and Clarkstown located east of Palisades Interstate Parkway (see Figure 9). This interceptor will provide capacity for an existing population of 1,140. It consists of 1.5 km (0.9 mi) of gravity sewers and does not require any pump stations.

The Conklin interceptor will provide service to an existing population of 233 in the northeast corner of the Town of Ramapo and the northwest corner of Clarkstown (see Figure 9). This interceptor will require one pump station and consist of 2.2 km (1.4 mi) of gravity sewer and 0.6 km (.4 mi) of forcemain.

The Upper Main Interceptor will convey flows from the western portion of the sewer district to the RCSD No. 1 STP. The interceptor is required to augment the existing upper main interceptor which, because of groundwater I/I and future flows from western portions of the district, will exceed its design capacity by 1,100 cu m p/d (3 mgd). The proposed pressure main consists of approximately 3,050 m (9,350 ft) of 40 cm (16 in) diameter pressure interceptor.

Collectors

The recommended lateral collection sewer system projected by the Town of Ramapo consists of approximately 186,600 ft (55,890 m) of 20 cm (8 in) gravity sewer, three pump stations, 600 m (5,300 ft) of forcemain, 23 grinder pump units and 960 m (3,200 ft) of lower pressure main. Of the above 16,500 m (55,060 ft)

of gravity sewer and 170 m (440 ft) of forcemain and one pump station have been found to be ineligible for federal funding.

RCSD No. 1 STP Expansion

Following is a list of the principal units which will be added or modified to expand the capacity of the RCSD No. 1 STP to 8,500 cu m (25 mgd). These units will be added directly adjacent to the existing facilities.

1. Main pumping station modified by an additional larger pump
2. Aerated grit chamber
3. Six primary settling tanks
4. Air driven rotating biological contactors (RBC) to provide secondary treatment. In addition, existing aeration tanks will be modified to accept RBCs.

Sludge Handling Facilities

On-site sludge handling at the RCSD plant will be accomplished by the addition of the following principle units.

1. Two gravity thickeners to thicken sludge from RBCs. The thickeners will be enclosed to provide odor control.
2. Conversion of existing secondary digester to a primary digester.

3. 30 m (90 ft) diameter unheated digested sludge storage tank.
4. Containerized methane gas storage
5. 450 kw generator for electricity generation from methane gas utilization.
6. Three belt presses for dewatering sludge and two grit cyclone classifier units for screening and separation.

Dewatered sludge will be hauled in water tight trucks to the Clarkstown landfill sludge composting facility. The composting site, which will use static-pile composting, will be designed as follows.

1. Composting operations will occur on concrete and asphalt pad covering 1.5 ha (3.5 a) of the site.
2. Landfilled material will be removed prior to construction of pad.
3. Pad will be contoured so that leachate will drain to retention ponds.
4. The ponds will be sized to accommodate runoff resulting from a ten year, 24 hour storm.
5. The ponds will discharge leachate (via pumping) to 210 m (700 ft) sewer connecting to RCSD No. 1 STP for treatment.

6. Composting operation will be conducted within enclosure with three walls and roof. Covered compost facility will have capacity to provide up to six months storage of compost.
7. Gravel access road approximately 450 m (1,500 ft) will be constructed.

Composted sludge will be applied as a soil conditioner to designated lands in the county. Potential outlets for composted sludge include landscaping and nursery operations.

V. Project Costs

The following are the approximate costs associated with the design of sewage collection, conveyance, treatment and disposal facilities for RCSD No. 1 and the Town of Ramapo.

Town of Ramapo Collectors:

Total Cost - \$1,045,500
 Eligible Cost - \$689,000
 EPA Grant (75%) - \$858,630

RCSD No. 1 Interceptors, Pump Stations, Forcemains, STP Expansion and Sludge Handling Facilities:

Total Cost - \$4,577,380
 Eligible Cost - \$3,758,380
 EPA Grant (75%) - \$2,858,630

The following are the estimated total project costs for construction of the proposed facilities including the above design costs.

	<u>Total Cost</u>	<u>Eligible Cost</u>
Collectors	\$20,600,000	\$13,185,000
Interceptors, Pump Stations, and Force mains	31,000,000	30,310,000
STP Expansion and Sludge Handling Facilities	68,389,000	67,101,000
TOTAL:	\$119,989,000	\$110,596,000

The total annual user charges to residents within the Town of Ramapo is estimated to be \$308.00. The total annual user charge to a resident within the RCSD No. 1 service area will be approximately \$100.00.

VI. Evaluation of Alternatives

No Action

The "no-action" alternative consists of the continued use of individual on-site treatment systems in Ramapo as well as the overloaded RCSD No. 1 STP and its sludge handling facilities. This alternative was rejected due to the existing need for improvement of water quality

and alleviation of health hazards in the service areas.

Collection System

Upgrading of on-site systems was not considered feasible because of soil conditions, high groundwater and shallow depth to bedrock. A sewage collection system is the most cost-effective alternative except in three small areas where adverse topography makes grinder pumps cost-effective.

Interceptors

Mahwah - All of the six alternative routings considered for the Mahwah interceptor consist of a major interceptor generally paralleling the Mahwah River with secondary interceptors discharging into the main interceptor (Mahwah). The proposed routing was selected because it minimizes secondary growth impacts by limiting the service area of the interceptor as much as possible to those areas which are in need of sewers and to which future growth is expected and planned for. In addition, this alternative is set back from the Mahwah River and thus avoids the construction impacts associated with the other alternatives that closely parallel the river. It is also the least expensive of the six alternatives.

Minisceongo - Of the two alternatives considered to serve this area, the proposed route (alternative 2) was found to be most cost-effective and environmen-

tally sound. This alternative will avoid much of the wetland and floodplain, and easements that would be required with alternative 1.

Phillips Hill Road - The original proposal called for the placement of the interceptor in the cul-de-sac between Kingsland Drive and Buena Vista Road and then following Kingsland Drive east. Under this proposal the interceptor would cut across a wetland at the end of Kingsland Drive and connect into and follow Phillips Hill Road until Rollingwood Drive. The present proposal will utilize existing laterals in Buena Vista Road and Kingsland Drive that connect to the Balter Road pump station. A gravity interceptor will connect the pump station to the Rollingwood Road cul-de-sac. This route was selected because it avoids wetlands, eliminates the Balter Road pump station and was approximately \$60,000 less expensive than the next least expensive alternative.

Conklin Road - Six alternative routings were considered to serve the Conklin Road area in the Town of Ramapo. Four of the alternatives included placing sewage lines in or adjacent to Buena Vista Road in the Town of Clarkstown. As discussed in Section VIII, residents of Clarkstown opposed the presence of an interceptor sewer in Buena Vista Road or Saw Mill Road because of the potential secondary impact to the undeveloped land along these routings. A fifth alternative consisted of pumping sewage from the Conklin Road area under the Pali-

sades Park interceptor. This alternative was rejected because it required three additional pump stations and the residents of Dogwood Lane objected to the routing. The proposed alternative which follows a route primarily through the Town of Ramapo was found to be the most cost-effective alternative.

Lake DeForest - An interceptor was proposed to serve the Lake DeForest area. The interceptor was rejected because of primary and secondary impacts to wetlands, streams, active orchards and agricultural land, water supply, steep slopes and secondary growth woodland and because it did not meet EPA requirements for eligibility. The proposed interceptor is still planned for construction with local funding.

Upper Pressure Main Interceptor - This interceptor will parallel the entire 3,050 m (9,350 ft) length of existing pressure interceptor which is located adjacent to a railroad right-of-way. As the right-of-way has been previously disturbed, there will only be minor impacts from the construction of this interceptor.

RCSD No. 1 STP Expansion

A number of alternative sites were evaluated for the expansion of the RCSD No. 1 STP. These alternatives consisted of the following: locating the expansion facilities away from the immediate location of the STP; building a second STP at another location; and rearranging the

expansion facilities at the existing STP site to minimize impact to wetlands adjacent to the STP. The first two alternatives were rejected because of the extremely high cost, the greater manpower and unit operations, and the additional interceptors that would be necessary for sewage conveyance to a new facility with the alternatives.

Several alternative arrangements of the STP expansion at the existing site were evaluated to minimize impact to the wetlands that are located directly north and south of the STP. Locating the new secondary treatment unit to the east of the STP in mixed hardwood area was rejected because of the large additional cost (3.5 million present worth) of pumping to this upland area. As the west side of the STP is close to Route 303, expansion in this direction was not possible. The original proposal of placing the administrative building and equipment garage to the north in a flooded shrub wetland along with an additional access road cutting through steep slopes was rejected in favor of the present proposal. This involves placing the administration building, and equipment garage in the hardwood area to the east of the STP and eliminating the additional access road. As with the original proposals, the new treatment units are located north of the existing facilities (see Figures 10 and 11).

Sludge Handling Facilities

Joint sludge facility with Orangetown

STP.

A detailed cost analysis determined that cost savings for a RCSD No. 1 - Town of Orangetown sludge handling facilities would not be significant when implementation schedules for joint and individual alternatives were considered. It was estimated that a joint facility would require one additional year for implementation compared with individual alternatives. Consequently both RCSD No. 1 and Orangetown decided it was in their best interest to pursue individual sludge handling alternatives.

Land Application

Land application of digested dewatered sludge without composting was not considered environmentally acceptable as large quantities of filter cake would have to be stored during portions of the year when, for climatic reasons, land application is not possible. Composting in conjunction with land application was selected because the composting operation can be carried out year round and because compost can be stored for long periods without adverse environmental effects.

Composting Sites

Six composting sites were evaluated (see Figure 12). The Route 303 industrial site was rejected because of its proximity to office buildings, limited amount of land, high land acquisition cost and

traffic problems. The site on Route 303 in Orangetown was eliminated because it would require the loss of a large area of wooded wetlands. In addition, the small parcel of land that is not environmentally sensitive on the site is planned for future construction. The Ramapo incinerator site was rejected because of the long travel distance to the site and the proximity to residences.

Although three remaining sites were considered feasible for composting, the Clarkstown landfill site was selected because it represents the site with least potential adverse impacts. The Congers Lake site offers ample area to locate, and is close to RCSD sewer lines. However, extensive clearing and a long access road over the Hackensack River would be required. Under this alternative, the Route 9W site was rejected because it would require clearing a heavily wooded area and is relatively near homes and business.

VII. Environmental Consequences of the Selected Plan

Collection Sewers

Approximately 90 percent of the collection system will be located in existing roadways right-of-ways. Limited use of rights-of-way will be necessary where topographical constraints preclude roadway routings and where land will be used for pump station sites.

The use of rights-of-ways will avoid long term impacts and minimize secondary impacts. Temporary disruption of traffic and noise related to construction activity will be a short-term nuisance.

All routings through or adjacent to wetlands have been eliminated from the proposed project. Where stream crossings are necessary, the contractor will be required to comply with New York State Stream work standards. In addition, the contractor will be required to follow environmental specifications concerning protection and replacement of trees and erosion and sedimentation control.

Interceptors

Mahwah River Basin

Although a number of modifications have been made to the proposed routing, the Mahwah interceptors will border and cross wetlands, floodplain and steep slopes at various points. Between Bayard Lane and Victory Road, the alignment of the Mahwah interceptor has been shifted to the east side of the Mahwah River to avoid the very steep slopes on the east side of the river. However, between Victory Road and Hemion Road, the interceptor will cross the river twice and cross and border the wetland along Route 202.

The Grandview Avenue interceptor will also border and cross wetlands and floodplains along Spook Rock Road and

Grandview Avenue between Carrol Drive and Wesley Chapel Road.

The Viola Road interceptor will border a small wetland and cross and floodplain between Mile Road and Route 202. This interceptor will cross an area of undeveloped land, potentially inducing development in this area. No alternative was available that would avoid these secondary impacts.

The Montebello Road interceptor traverses a wetland between Robin Hood Road and Nottingham Road. The routing has been modified to move the alignment away from the creek, steep slopes and wooded areas as much as topographical constraints allow.

As discussed in Section VII-B, the contractor will be required to follow a number of special environmental constraints to protect wetlands along the proposed route. As with the collectors, the contractor will be required to use construction measures to reduce erosion and sedimentation, protect and replace trees, and restore disturbed areas to their original condition.

In addition, grant conditions are being used to prohibit hook-ups to the proposed sewer system from future development in wetlands and floodplains.

Minisceongo Interceptors - Sewer crossings of the south Minisceongo River will be required north of the Pomona pumping station and along Route 202 (east of

Camp Hill Road). The contractor will be required to follow stream crossing standards to protect the stream and wetlands located downstream.

The Pomona interceptor will parallel the creek along Adele Boulevard between New Hempstead Road and Scotford Lane. The routing has been moved to the west side of the creek to avoid steep slopes and mixed hardwood on the east side. This routing will traverse a flat brush area before cutting to the east side of the creek at Scotford Lane.

Phillips Hill Area - As discussed under the alternatives section, the proposed Phillips Hill interceptor alignment was selected because it avoids impacts to wetlands. Although this routing will be designed to minimize impact to a small woodland which it traverses, some trees may have to be removed. The contractor will be required to follow tree replacement specifications.

Conklin Road Area - The primary impact associated with the proposed routing is the secondary impact of crossing a mixed hardwood forest between the southern end of Carteret Drive and Buena Vista Road. Although the interceptor is sized at the minimum possible diameter 20 cm (8 in), it will contain sufficient excess capacity to allow development of the wooded area to hook up to it. Development of this area is likely with or without sewers as new residential development is currently making large inroads into the wooded area. Alternatives to the pro-

posed alignment which would avoid traversing the wooded area by paralleling Buena Vista Road were opposed by the Town of Clarkstown because of the secondary impacts that such an alignment would pose to the Buena Vista Road area.

RCSD No. 1 STP Expansion

The expansion of the STP will require the following loss of wetland to the north of the STP and mixed hardwood to the east of the STP (see Figure 10).

Gross Area Area Taken By
(Within Existing STP Construction
Property Boundary)

(hectares) (acres) (hectares) (acres)

Reeds	2.21	5.31	1.50	3.60
Flooded				
Shrubs	0.58	1.30	0.18	0.43
Flooded				
Deciduous				
Tree	.01	.26	0.003	.43
Wret				
Meadow	1.25	2.46	---	---
Mixed				
Hardwood	1.83	4.40	.73	1.74

Approximately half of the reedgrass wetland to be taken by construction has been disturbed by present construction activities at the plant site.

The expansion will also require that the natural wetland drainage channel to the east of the STP be replaced with a cul-

vert. As compared to the disturbance of wetlands by the underground interceptors, the proposed expansion will represent a permanent loss of wetland habitat for wildlife in this area. As discussed in the previous section of this report, the cost of alternatives that would avoid impact to wetlands (i.e., constructing new STP) were found to be prohibitive. Of the alternative expansion layouts considered, the proposed arrangement was selected because it minimizes the loss of wetlands.

Construction on the northern side of the STP will pose potentially severe short-term impacts to the Sparkill Creek which traverses the northern edge of the site. Clearing and grubbing could cause heavy siltation of rivers and dewatering operation could seriously reduce the streamflow of the creek especially during periods of low flow. As part of the special environmental specifications, the contractor will be required to restrict clearing and grubbing to the minimum easement, stay back from creek banks and recharge the creek with filtered water from the construction area.

Sludge Handling Facilities

Clarkstown Landfill Site - Composting

The site is located in the Hackensack River Drainage Basin. The nearest major tributary is Greenbush Brook, a Class "C" waterway (suitable for fishing) that runs north to south along the western border of the landfill. A connecting

tributary to the north drains the composting site. This tributary is several hundred feet from the site and is designated a Class "D" waterway (suitable for industrial or cooling uses). The water assimilates and collects runoff from the landfill and the urbanized areas along Route 303.

All effluent from composting operations, including leachate from composting piles and washdown water, will be collected in a water retention pond and discharged to a sanitary sewer on Greenbush Road. The retention ponds will be sized to accommodate runoff resulting from the once in 10 year, 24 hour storm. Neither water quality nor uses of adjacent waterways will be adversely affected by composting at the site.

The location of the composting facility at the site will be compatible with the adjacent use of the site for a sanitary landfill. Since the area is presently used as a waste processing area, a composting facility will not alter the actual or perceived use of the site.

Potential Compost Application Sites

The compost market survey identified a number of potential compost users in Rockland County, such as landscapers and nurseries. In addition, potential compost use as a cover material for the Clarkstown landfill has been proposed.

Currently, no agricultural land is planned to be used for application of com-

posted sludge. Should agricultural land be considered at a later time, sludge applications would be limited to lands used to grow field crops and application rates would be subject to U.S. Department of Agriculture guidelines for sludge application rates. Periodic groundwater monitoring will be required to assure that leachate is not contaminating the groundwater.

Water Supply

Almost 90 percent of the population of Rockland County is served by the Spring Valley Water Company which gets its supply primarily from Lake DeForest on the Hackensack River, and a reservoir in Stony Point and from an extensive groundwater system. Because of a decrease in population projections over the next 40 years, the water supply which presently exists in the county will be adequate into the foreseeable future. However, there are alternative sites that are available for developing new sources of water supply should the need arise.

Under the proposed project, water that has its origin in one of the river basins in the sewer district will be transferred to another basin when it is treated and discharged. In addition to household water, groundwater I/I enters the sewers from all the basins. The existing and proposed sewer system discharges the water from these basins to the Hudson River.

The present interbasin transfers within the sewer district have not been shown to have a negative impact on the environment through reductions of flow streams. The proposed elimination of as much I/I as is cost-effective will reduce such transfers to a minimum, possibly resulting in an overall reduction in interbasin transfer even with the proposed sewer system. Thus, the proposed project will have no adverse impact on water flows in the different river basins.

Air Quality

The study area is within the New York State designated Southern Tier East Air Quality Control Region (AQCR).

At present, only the National Ambient Air Quality Standards (NAAQS) for photochemical oxidants are being contravened within the AQCR. A State Implementation Plan has been prepared by New York State which provides for the attainment of the NAAQS within the AQCR. An analysis has shown that the proposed project will not by itself result in contravention of NAAQS.

There will be localized dust and exhaust emissions from construction equipment. These will be mitigated by the proper construction specifications. Operation of the facilities should not result in odors beyond the STP site.

Noise Levels

Noise levels will be high for short-term

periods (during construction), but will be localized around construction sites. The contractors will be responsible for not exceeding the Occupational Safety and Health Act (OSHA) standards for noise exposure on a daily basis.

In conformance with the Advisory Council of Historic Preservation Procedures, the EPA must investigate the cultural resources located within the project area that would be affected by construction of the proposed facilities. A cultural resource investigation has shown that there are no resources within the project area which are on or eligible for inclusion on the National Register of Historic Places which will be affected by the proposed construction.

Population and STP Design

The population of the planning area is projected to increase from approximately 160,000 to 201,000 over the 20 year design period of the proposed sewerage facilities. The population projections are based on recent development plans, zoning, and a constraints analysis which excluded environmentally sensitive areas (such as wetlands, floodplains, agricultural lands and steep slopes) from development. These projections are slightly lower than the population projections, prepared by the New York State 208 Water Quality Management Plan. The increased capacity of the proposed STP expansion is based on these population projections for the service area.

Secondary Impacts

The proposed project may cause an increase in the rate of development. However, except for the Viola Road interceptor, which conveys from the northern portion of the district, the proposed facilities provide sewers only in those areas which are either developed or where there is a strong potential for development. As discussed under "Population" the capacity of the STP is designed only to handle flows from land that is not environmentally sensitive. In addition, grant conditions are being used to prohibit the connections of future development in wetlands and floodplains to the proposed facilities.

B. Steps to Minimize Adverse Effects on the Environment

A NYSDEC permit will be required for construction of collection and interceptor system alignments crossing or parallel to streams. Where permits are required, all work in the vicinity of water bodies must meet the New York State stream work standards including specifications that will insure no reduction or disruption of stream flow which can endanger the aquatic life or obstruct passage of fish. Machinery must be operated from the stream bank, not in the stream. Except for stream crossings, all work must be far enough from the bank that it is not disturbed.

When the top of excavation is within ten (10) feet of the top of any stream bank,

the Contractor shall provide protection for the stream bank as approved by the Engineer.

Erosion and Sedimentation Control

The Contractor shall, at the direction of the engineer, use necessary methods to minimize erosion from easements and access roads, especially in stream or watercourse areas. Right-of-way at surface water crossings or drainage ways shall be protected by sandbagging, hay-baling, mulch, or the use of jute or excelsior blankets, as conditions require.

Methods of preventing erosion shall also include berms, dikes, and other temporary and permanent structures. Erosion control methods shall be employed during site clearing, construction of pipelines, and at the time of final restoration.

Air Quality

The major construction impacts will be dust and exhaust emissions. Dust will be controlled by water sprinkling and sweeping of paved areas, and mulching on unpaved areas. Natural materials, such as chippings from on-site vegetation, should be used for mulching whenever possible. The use of calcium chloride or petroleum products for dust control will be prohibited.

Wetland Construction

Where construction must take place in or

adjacent to wetlands, the contractor must adhere to the following environmental specifications.

1. Prior to the start of construction, fences and hay bales will be placed around the edge of the construction site that borders the wetland. Metal cyclone fence must be used at the STP site. All construction activity will be limited to the area behind the fence.
2. The original grading must be restored in order to maintain the original vegetation found there.
3. Manholes, where necessary in the wetland, should be located as close as possible to either end of the wetland to reduce the length and impact of the permanent access road.
4. Impervious barriers should be placed regularly across the trench to prevent water flowing down the slope of the line and draining area.
5. NYSDEC and EPA must be notified at least 48 hours in advance of construction activity.
6. The culvert being used to replace the swale must be of the same elevation as swale to allow continued wetland drainage pattern.

Tree and Shrub protection and Replacement

No trees shall be cut without the permission of the engineer or other designated authority. Trees not scheduled for removal shall be carefully protected from damage to bark by "boxing" with snow fence of boardings. Where trees are to be replaced, the replacement size schedules shall be in accordance with EPA-NYSDEC specifications.

Whenever excavation is to be performed within the root zone of trees (normally about the spread of the limbs), the contractor shall prune damaged roots or limbs over one inch diameter and prune the tree to match the undamaged root system. When the excavation is within 10 feet of trees over 38 cm (15 in) in diameter, the contractor shall tunnel under the tree.

The contractor will be responsible up to and including a one year maintenance period for the vegetation that has been damaged or replaced during construction.

Special Grant Conditions

To protect environmentally sensitive areas from development the Federal construction grants for this project will include the condition prohibiting hook-ups to the system from new development located in floodplains and wetlands. The following grant conditions will be used:

- a. The grantee shall submit to EPA and the NYSDEC an approvable facilities plan amendment including maps that clearly delineate all specific vacant parcels of land within the 100 year floodplain as defined by the U.S. Department of Housing and Urban Development (HUD), or within wetlands as defined by the U.S. Fish and Wildlife Service no later than 45 days after grant acceptance. These maps must also show which parcels had been developed prior to date of issuance of finding of no significant impact/environmental assessment (FNSI/EA).
- b. The grantee agrees that for a period of 50 years from the date of the FNSI/EA no sewer hook-up or other connections to the sewage collection system included in the scope of this grant will be allowed or permitted so as to allow the discharge of wastewater from any building, facility or other construction on any parcel of land within any wetlands or within the 100 year floodplain, which land parcel as of the date of the FNSI/EA was undeveloped (i.e., upon which no building, facility or other construction had been erected or placed) unless approved in writing by the Regional Administrator.
- c. This condition is intended to benefit any persons or private organization or governmental entity which may have an interest in the

avoidance of any future development in the designated areas. Any such beneficiary (who may otherwise have standing to seek enforcement and the right to begin such action in a court of competent jurisdiction) may seek to enforce compliance with this condition in the courts of the State of New York against the grantees or any non-Federal person, organization, or entity subject to this condition if notice of intent to seek such enforcement is first given to the EPA Regional Administrator, New York State Department of Environmental Conservation, the grantee and affected governmental entities and if none of those so noticed fails to initiate corrective action within ninety days of such notice.

- d. If the facilities plan amendment required under a. above delineates any vacant parcels which will be affected by this special condition, the grantee will conduct a public hearing within 60 days of submission of the facilities plan amendment. The public hearing must be preceded by a notice of 45 days, during which time the facilities plan amendment will be made available to the public. The public hearing record will remain open for 30 days after the hearing to allow for additional public input.

VIII. Coordination of Environmental Review and Reference Documents Consulted

a. Public Participation Program

Four public information meetings were held in three locations in the RCSD No. 1 relative to location, alignment and service area for the interceptors. One was held in Orangetown concerning the STP expansion. As a result of these meetings, major changes were made in the alignments or service provided by the Mahwah River interceptor and the Conklin Road interceptor. In response to comments from the residents of Orangetown concerning odor control, new treatment processes were reviewed with respect to elimination of odors. Review of the proposed plan resulted in the requirement that the compost facility be completely enclosed for operational and odor control reasons.

On January 28, 1980, a public hearing was held at 8:00 PM in the Clarkstown Town Hall Auditorium concerning proposed RCSD No. 1 facilities. A number of questions and objections were raised concerning the proposed project.

The most discussed issue at the hearing concerned existing and potential odors at the RCSD No. 1 STP. The following is a partial list of the measures that have been

and will be taken to deal with odor control at the STP:

1. Discontinuing use of Zimpro oxidation unit.
2. Improved process and sludge handling equipment and procedures which will minimize solids recycled in the plant.
3. Covers over the existing and proposed primary settling tanks.
4. Covered air driven rotating biological contactors which will replace the present open aeration tanks.
5. Odor control ventilation in solids handling areas and improved process control and information systems.
6. Aerated grit removal.
7. Covered and ventilated sludge thickeners.
8. Prechlorination of influent sewage.
9. Covered digester feedbox and overflow boxes.
10. Equipment redundancy will provide additional safeguards against process component failure.

The Hackensack Water company objected to the location of the composting site at the Clarkstown landfill because of possible contamination of groundwater or surface water. As discussed in Section VII, the composting facilities will be enclosed on an impervious pad. It will be contoured to collect runoff in a water retention pond which will discharge the runoff back to the STP for treatment.

The water retention pond will be sized to collect the runoff from the entire compost site that would be produced from a 10 year, 24 hour storm. In addition, the covered compost facility provides up to six months compost storage.

A number of residents asked about the possible relocation of the STP and alternatives to expansion. Although portions of the infiltration/inflow to the RCSD No. 1 STP are planned to be removed, flows to the STP due to I/I which it is not cost-effective to remove and due to the increased population, still make expansion of the STP necessary. The use of an alternate treatment site was precluded by the enormous cost that a new site (including new conveyance facilities and new outfall to river) would require.

Two residents questioned the inter-basin transfer of water that will

occur with the proposed project. As discussed in the environmental assessment, the district is comprised primarily of the drainage basins of three river systems: the Hackensack River which drains to the tidal Meadowlands, the Mahwah which drains toward the southwest to the Ramapo River and the Minisceongo which drains north and then east to the Hudson River. Water that is discharged to the existing and proposed system has its origin in more than one river basin and is used in others. In addition to household wastewater, I/I enters the sewers from all three basins. The existing and proposed system discharges water from these river basins to the Hudson River. The present interbasin transfers within the sewer district have not been shown to have a negative impact through reduction of stream flow. The proposed elimination of I/I will reduce such transfers to a minimum.

Several of the residents complained that the opportunity to speak at the public hearing did not occur until such a late hour that they had to leave before they had the opportunity to be heard. In response, the sewer district sent a copy of the responsiveness summary of the public hearing to all those who signed up to speak but did not do so. The sewer district invited these residents to submit written

comments or raise questions concerning the issues.

On July 30, 1980 at 8:00 PM a public hearing was held in the town of Ramapo Town Hall concerning the proposed Ramapo collection sewers. Several residents requested information concerning the proposed sewers that would serve them. No objections were raised to the project.

b. Federal State and Local Agencies Consulted

1. Agencies Consulted:

- U.S. Fish and Wildlife Service
- New York State Department of Environmental Conservation
- U.S. Environmental Protection Agency

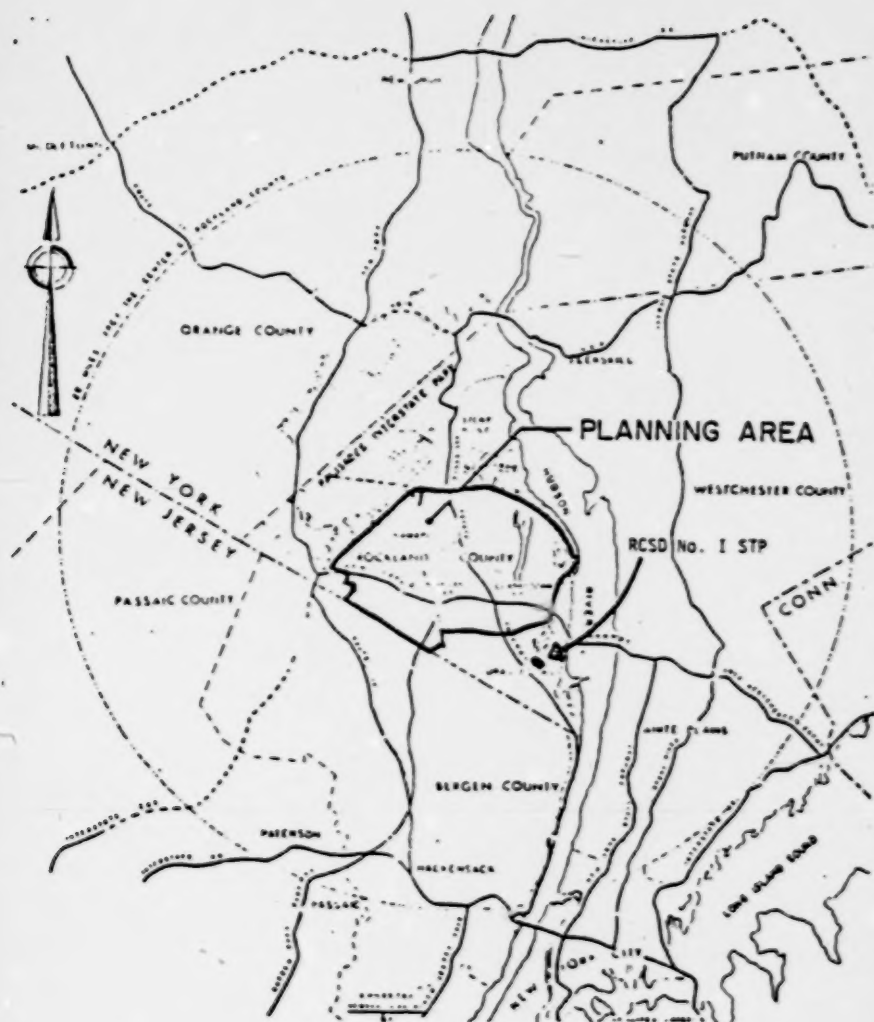
2. Documents Consulted:

- New York State Water Quality Management Plan for Rockland County
- Wastewater Facilities Plans -
 - a. Rockland County Sewer District No. 1 Interceptors, Force Main and Pump

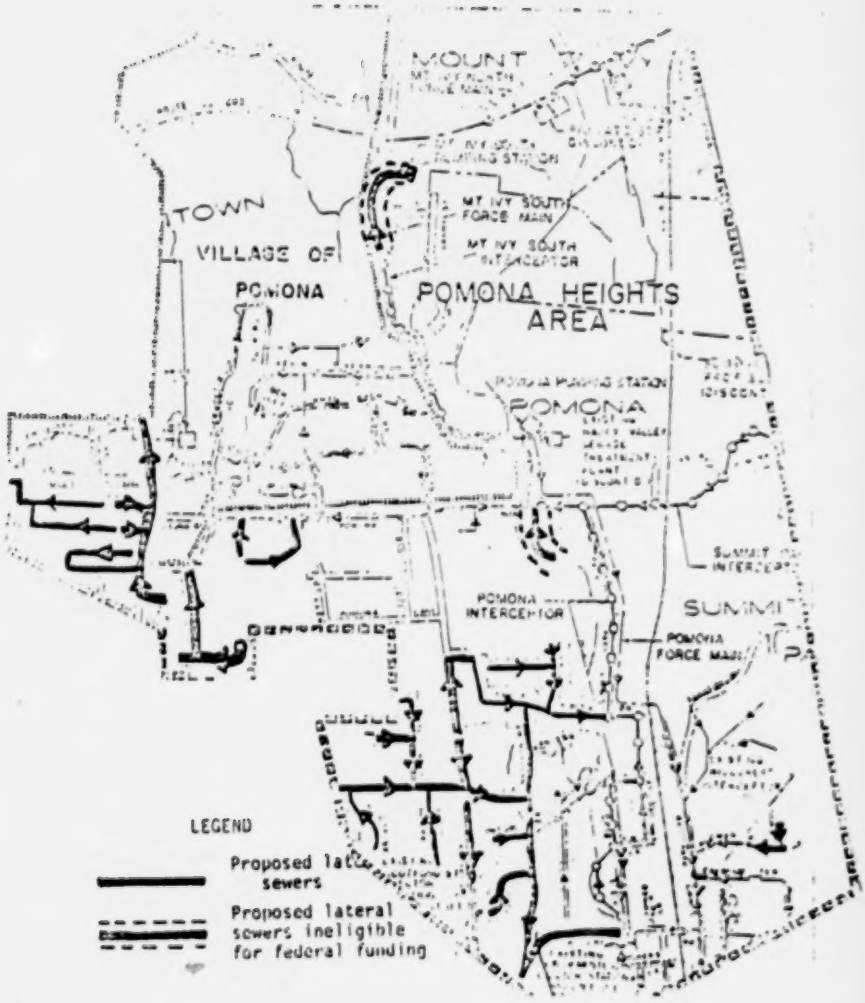
Station, Volumes 1
and 2

- b. Rockland County Sew-
er District No. 1
Sewage Treatment
Plant
- c. Rockland County Sew-
er District No. 1
Sludge Management
Report
- d. Ramapo Extension to
Collection System

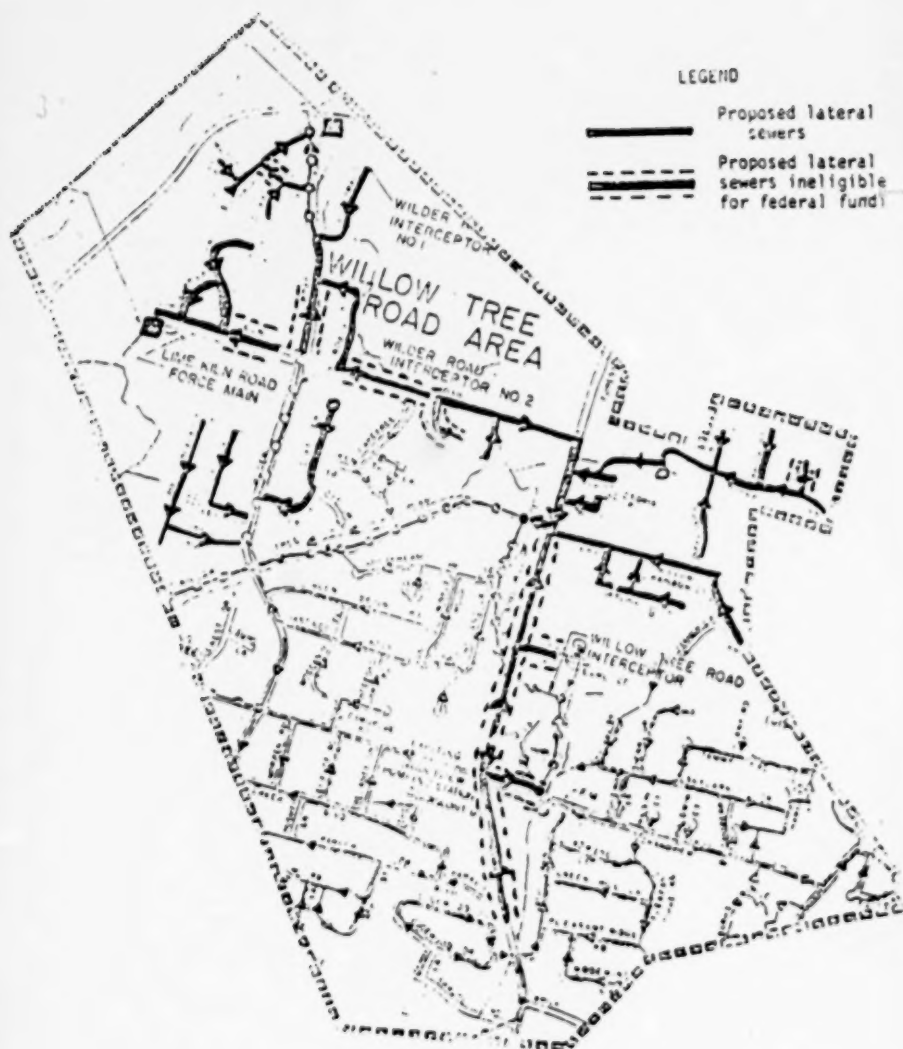
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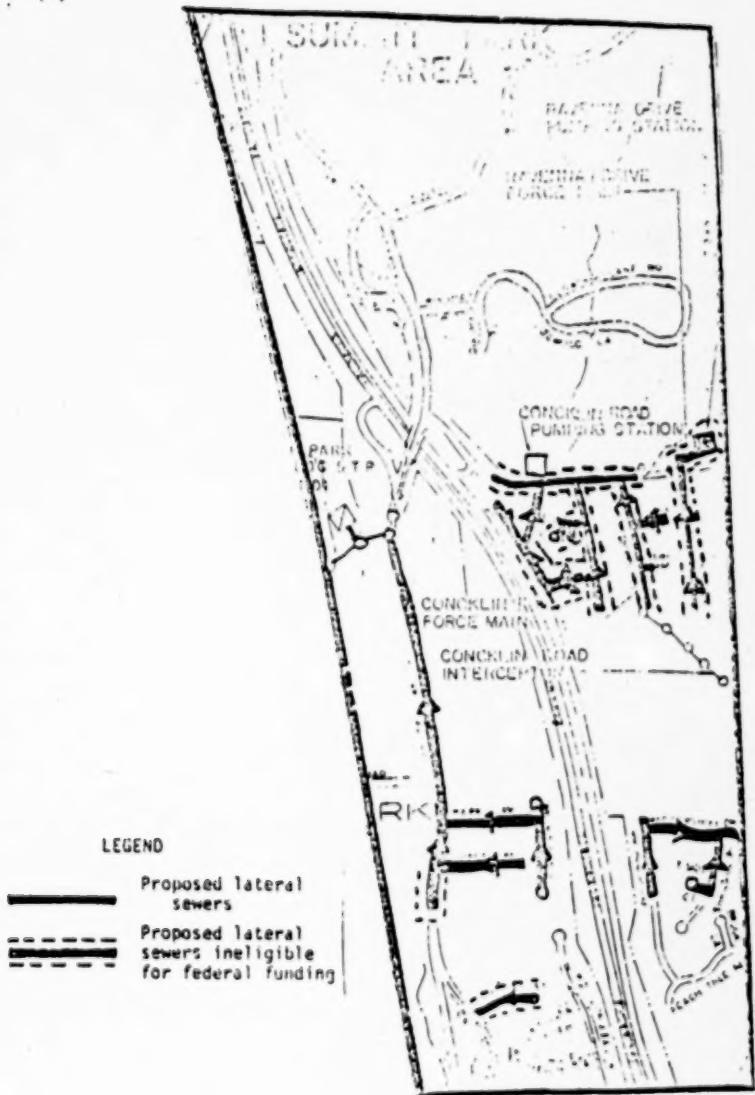
LOCATION PLAN



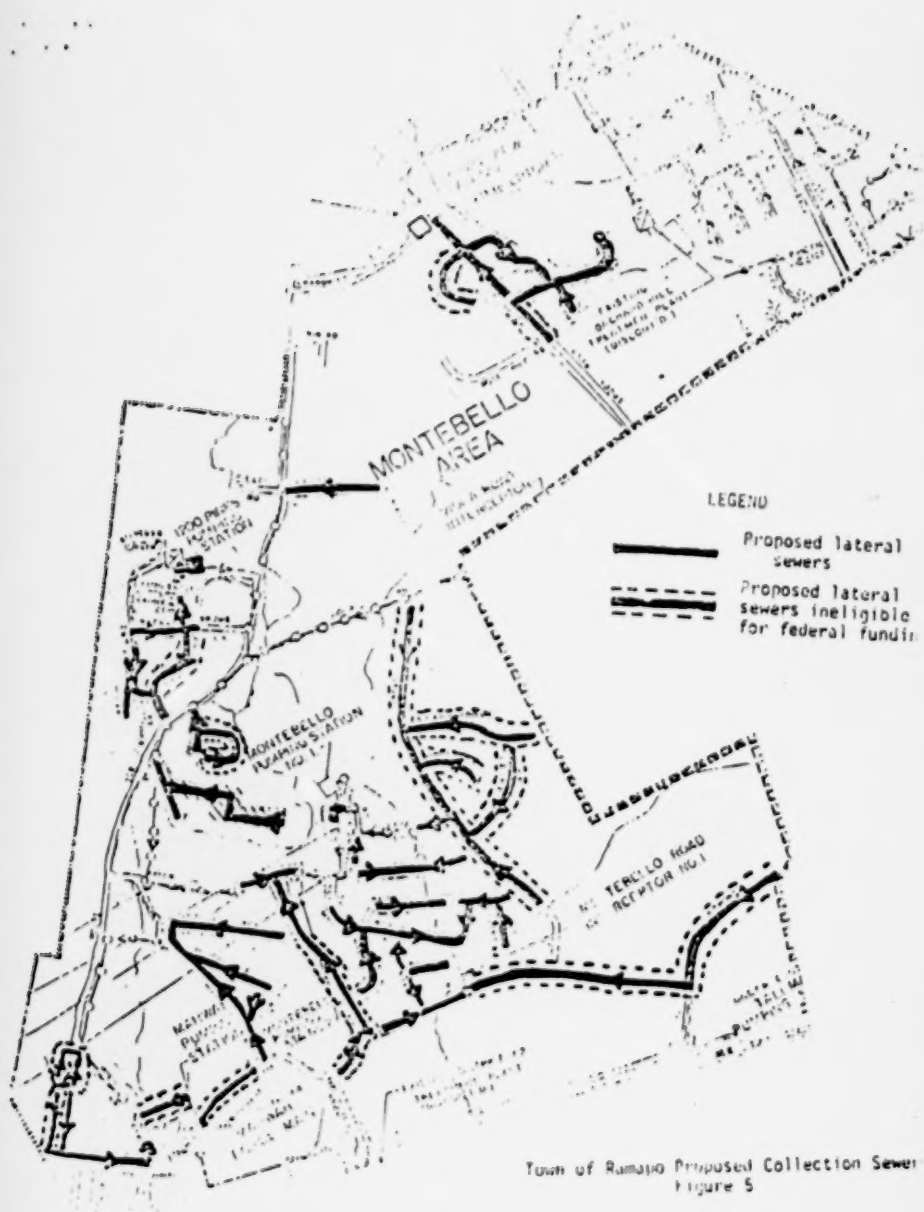
Town of Ramapo Proposed Collection Sewers
Figure 2



Town of Ramapo Proposed Collection Sewers
Figure 3



Town of Ramapo Proposed Sewerage Collection System
Figure 4



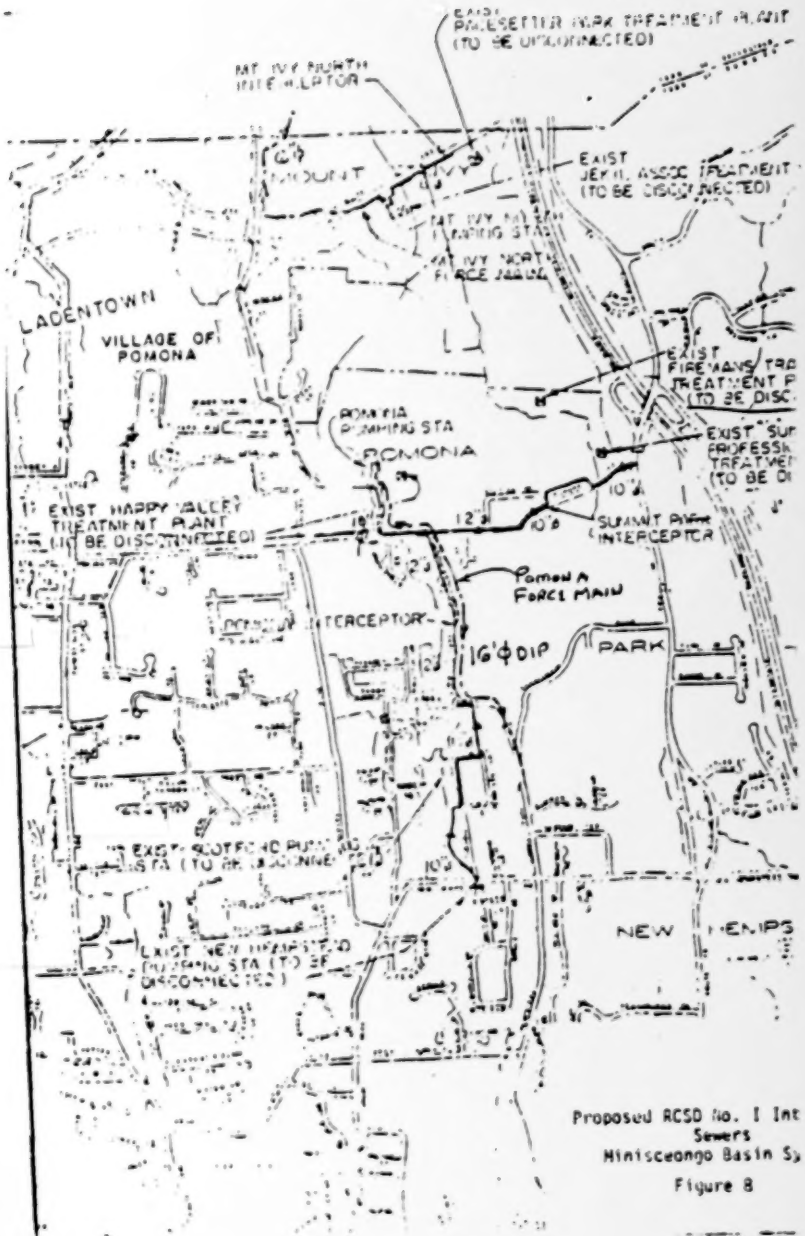


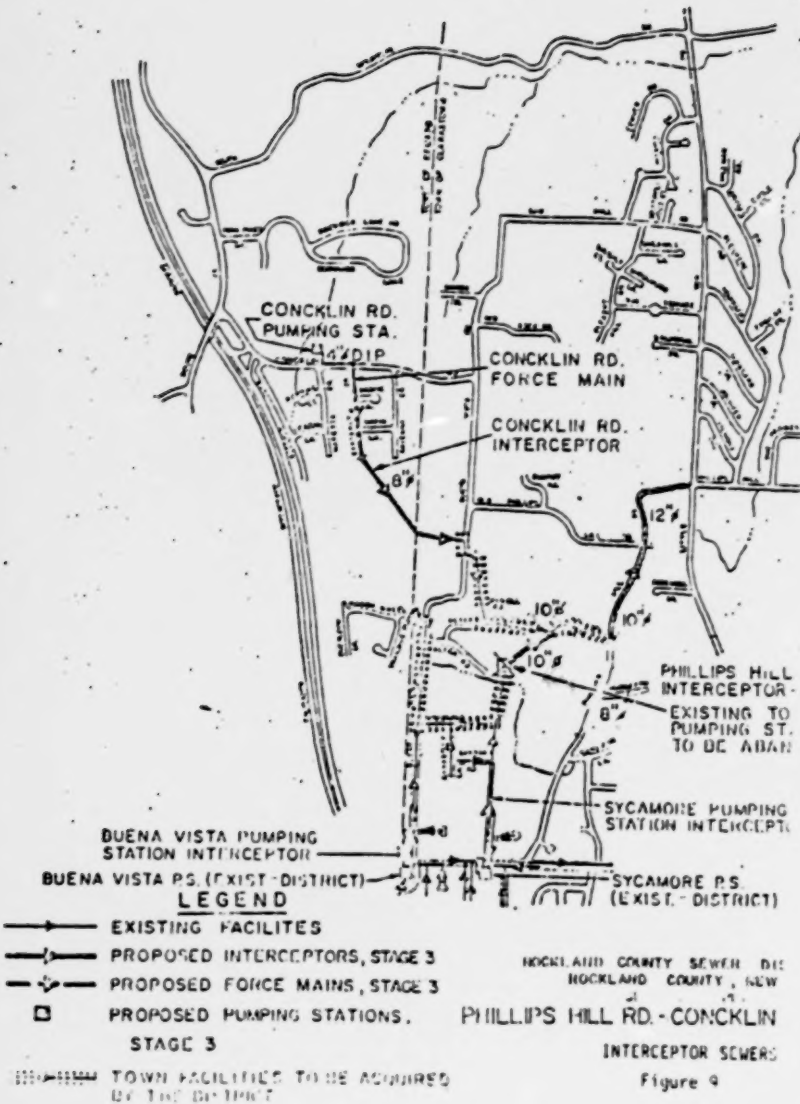
Town of Ramapo Proposed Collection Sewers
Figure 6

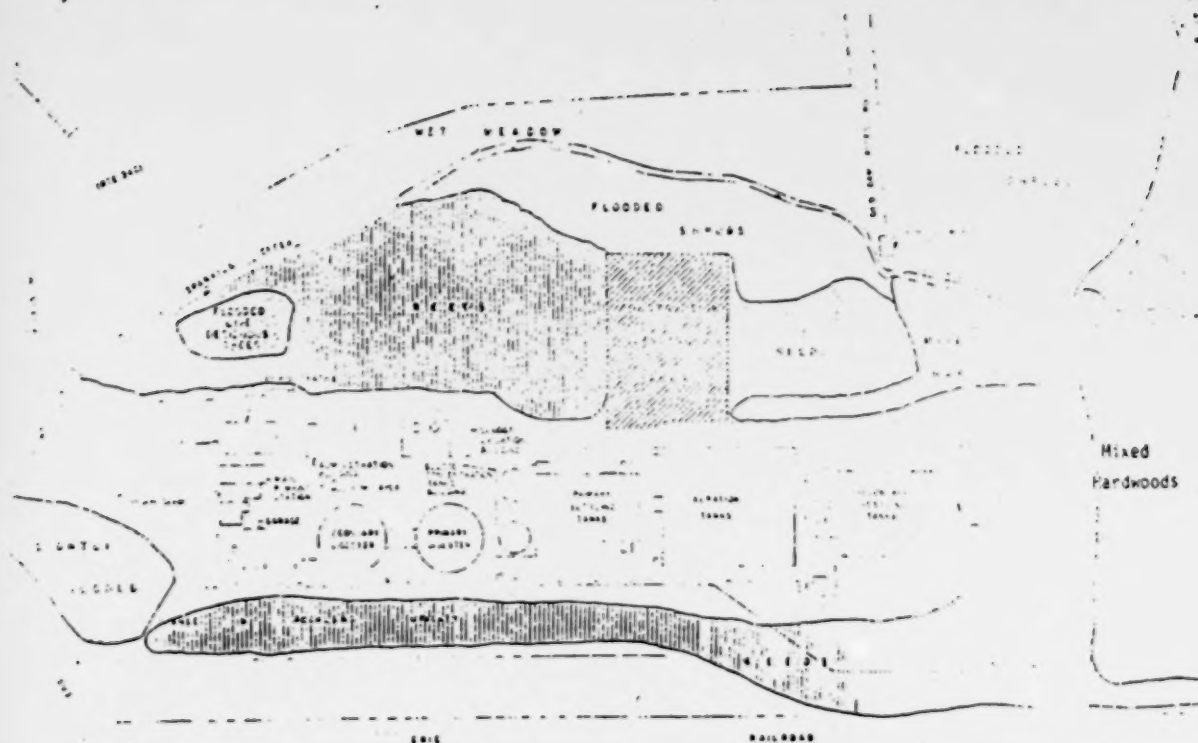


Mahwah Basin Interceptor Sewer System
RCSD No. 1

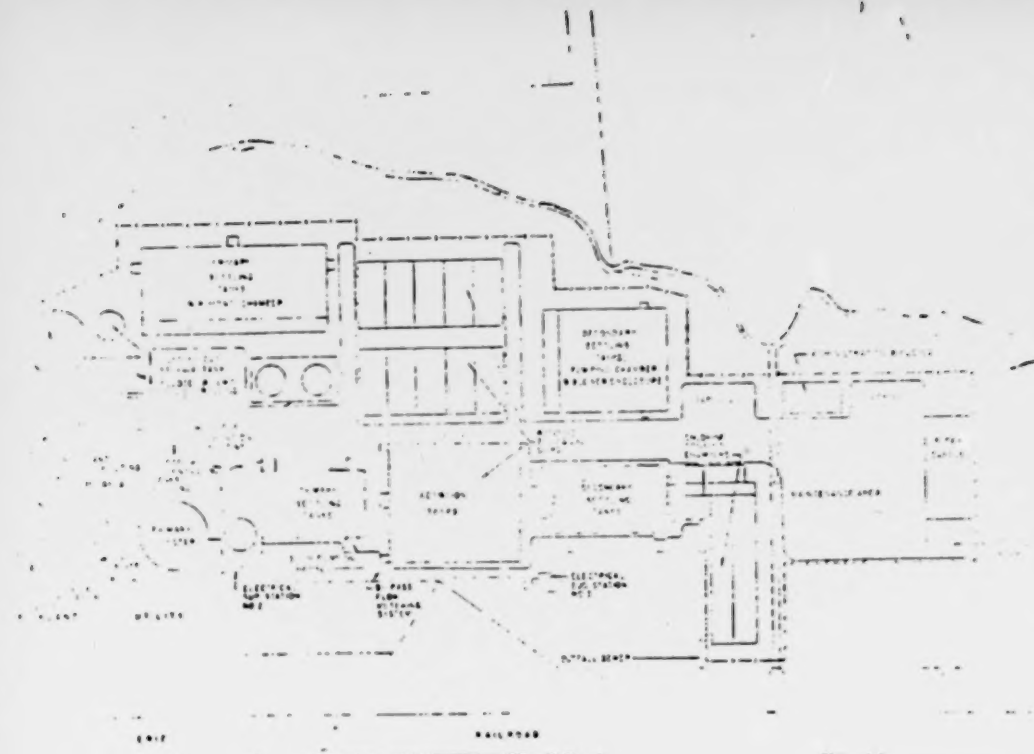
Figure 1










Existing RCSD No. 1 STP and Adjacent Environment
Figure 10



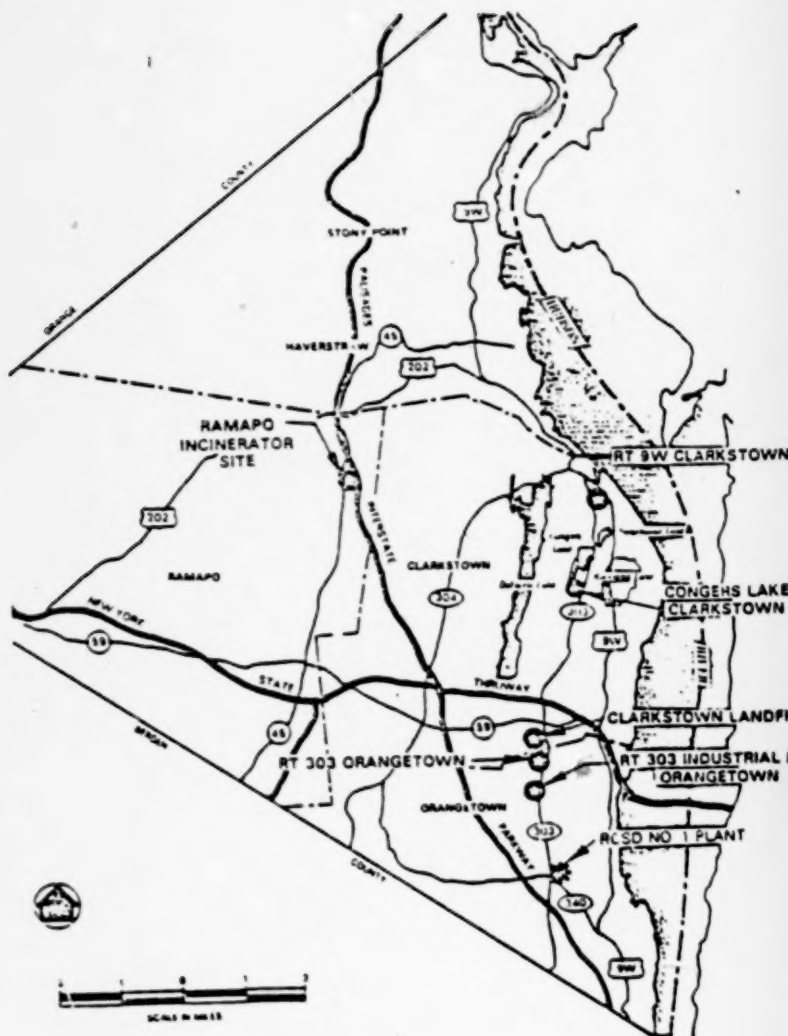
LEGEND

EXISTING BUILDINGS 

EXISTING TANKS 

PROPOSED TANKS 

WASTEWATER TREATMENT PLANT NO. 1
 PROPOSED EXPANSION
 Figure 11



POTENTIAL COMPOSTING SITES

Figure 12